

AI-DHAHABĪ'S TANQĪH

**A Critical Edition, Translation and Commentary on the Sections on
Crime, Punishment and War**

MS Istanbul, Feyzullah Library, 296

**BY
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**IN THE NAME OF ALLĀH,
THE MOST GRACIOUS, THE MOST MERCIFUL**

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DECLARATION

**I, the undersigned, hereby declare that this thesis is written by myself and that
it does not represent the work of any other person**

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ABSTRACT

This thesis is both an examination and a translation of the manuscript in the Feyzullah Library entitled *Tanqīḥ kitāb al-Taḥqīq fī aḥādīth al-Ta'liq* by Muḥammad b. Aḥmad al-Dhahabī. Within the context of this thesis, reference is made only to the sections on *jināyāt* (crime), *ḥudūd* (prescribed punishments), and *jihād* (war).

In view of the fact that the manuscript is mainly related to the Ḥanbalī school of law and discusses disputation questions using *ḥadīth* evidence, Chapter 2 deals solely with the elucidation of the science of disputation, its meaning, significance, forms, and related books compiled on questions of disputation. Within the sphere of Chapter 3, a discussion of both the developmental stages of the Ḥanbalī school of law as well as its fundamental principles is presented. Chapter 4 traces the developmental stages of the *Tanqīḥ* beginning with the *Ta'liq* of Abū Ya'lā right up until the *Taḥqīq* of Ibn al-Jawzī. Chapters 5, 6 and 7 comprise a translation of the original sections from the *Tanqīḥ* from Arabic into English, with relevant discussion of related *fiqh* issues and references to associated *ḥadīths* and their sources.

What emerges from this study is the scholarly status of al-Dhahabī in the science of *fiqh* and the richness of the different schools of *fiqh* in general and the role of the Ḥanbalī school of law in particular.

GLOSSARY

Al-‘āqilah: The male relatives of a person descended from one common father, such as brothers, nephews, paternal uncles, and paternal cousins. See: ‘*al-Rawḍ al-murbi*’ *sharḥ Zād al-mustaqni*’ ” with the marginal notes of Ibn Qāsim: 7:297.

Al-‘asīf: The hired worker. It is named ‘*ḥadīth al-‘asīf*’ because when the man asked the Messenger of Allāh he said to him: (*kan ibnī ‘asīfan ‘alā hādihā*) ‘O Messenger of Allāh, my son was hired by such and such a man . . .’.

Al-buyū’: The plural of *bay’*, which is the exchange of goods for goods or money or in other words: business transactions.

Al-jadīd: *Al-jadīd* is what al-Shāfi‘ī propounded in Egypt, whereas *al-qadīm* is what he propounded in ‘Iraq but retracted. Hence if two differing opinions are found then *al-jadīd* is the one to be followed.

Al-raf’: The attribution of a *ḥadīth* text to the Messenger of Allah.

Al-ṣawī: An illegal attack upon another person. Also applied to disturbed animals that kill a person. See: ‘*al-mawsū‘ah al-fiqhīyyah*’: 28:103.

Al-siyar: The plural of *sīrah*, meaning the method be it good or evil. See: ‘*al-Ta’rīfāt*’ of al-Jurjānī: p.122.

Anṣār: The plural of *Anṣārī*, being those Companions of the Prophet from Madīnah. It is said that they are so called because of the aid (*nuṣrah*) they gave to the Prophet. The term is mentioned in the Qur’ān a number of times. See: al-Sam‘ānī, *al-Ansāb*, 1:368.

Bay’ al-‘arāyā: The plural of ‘*ariyya*, A sort of sale by which the owner of palms tree is allowed to sell fresh dates (*ruṭab*) while they are still over the palms, by means of estimation, for dried plucked dates.

Bint labūn: The female camel that has entered the third year of its life. See: ‘*al-muṭli*’: p.124.

Bint makhāḍ: The female camel which has entered its second year. See: 'al-muṭli': p.123.

Ḍa'if, pl. ḍu'afā: A degree slightly below *ḥasan*. It is also applied to every *ḥadīth* in which the conditions for acceptance are not found. See: 'al-mūqīzah' of al-Dhahab ī: p.33. If a transmitter of *ḥadīth* is described as being *ḍa'if*, then his *ḥadīth* cannot be used as evidence but he is accepted in *mutāba'āt* and *shawāhid*. This is the fourth level of invalidation according to al-Dhahab ī. See: 'mabāḥith fī 'ilm al-jurḥ wa al-ta'dīl' of Qāsim Al ī Sa'd: p.87.

Dār al-ḥarb: Every land in which the laws of *kufṛ* are prevalent. See: *al-mawsū'ah al-fiqhīyah*, 7:121.

Dhimmī: Relative adjective of *dhimmah*, being the contract undertaken by the Imām or his deputy for the safety of a non-Muslim's person and property in exchange for him undertaking to pay the *jizyah* tax and accepting the laws of Islām. See: 'al-mawsū'ah al-fiqhīyah, 7:121.

Fatwā, pl. fatāwī or fatāwā: The explanation of a religious ruling to one who asks about it. See: 'al-mawsū'ah al-fiqhīyah, 32:20.

Ghulūl: The taking of an item of war booty before it has been divided up. See: 'al-mawsū'ah al-fiqhīyah': 31:272.

Ghusl: The religious act of bathing after a legal impurity.

Ḥaddathanā, abbreviated in the text as: (*nā*) or (*thanā*): This term is used by the relater of *ḥadīth* to show that he actually heard the *ḥadīth* along with other students in the words of the *shaykh*, i.e. the *shaykh* read for them the *ḥadīth*. If the relater heard it alone from the *shaykh* he uses the term *ḥaddathanī* (He related to me) or *samī'tu* (I heard). As for *akhbaranā* or *akhbaranī*, abbreviated in the text as: (*anā*): This shows that the student himself read out the *ḥadīth* for the *shaykh* who would listen and confirm it. "It does not necessarily mean that the traditions were transmitted orally and no books were used. See: 'al-Mūqīzah': p.55. for more details see: M. M. A'zamī, 'Study in Early Ḥadīth Literature' p. 300, American Trust Publications, 2nd edition 1978.

Ḥadīth: That which is attributed to the Messenger of Allāh. It is also said that it means an account and includes that which is attributed to the Prophet or to others like the prophetic Companions (*ṣaḥābah*) or those who came after them (*tābi'īn*). See: '*Tadrīb al-rāwī*' of al-Suyūṭī: 1:29, edited Naẓr al-Fāryābī, Dār al-Kalim al-Ṭayyib, Damascus.

Ḥāfiẓ: is a person endowed with an ability to retain what he has learned by heart. see '*The Rise of Humanism*' p.99. it is also said that he is a transmitter of *ḥadīths* endowed with excellence of memory. '*An Introduction to the Hadith*' by John Burton p.198.

Hālik: The extremely weak narrator, being the third level of invalidation according to al-Dhahabī. The *ḥadīth* related by him cannot be used as evidence and he is not accepted in *mutāba'āt*. See the table.

Ḥaqqah: This refers to a female camel which has completed three years, so called because it has become ready to be ridden or to carry burdens. See: '*al-Muṭṭi'*': p.24.

Ḥaram: A protected area in which certain behaviour is forbidden and other behaviour necessary. The area around the Ka'ba in Mecca is a *ḥaram*, and the area around the Prophet's Mosque in Madina is a *ḥaram*.

Ḥarbī: a non-Muslim who is not party to the contract of the *dhimmah* or of security. See: *Dhimmī*, and '*al-mawsū'ah al-fiqhīyah*', 7:104.

Ḥadd, pl. ḥudūd: Linguistically carries the meaning of prevention. The term means the religiously prescribed punishment for crime. See: '*al-ta'rīfāt*' of al-Jurjānī: p.83; and '*al-mawsū'ah al-fiqhīyah*': 17:129.

Ḥukūmah: The ruling given by the judge in fixing the compensation to be paid by the criminal to the victim of the crime. This in cases where the amount of compensation is not established. See: *al-mawsū'ah al-fiqhīyah*, 18:68.

Ḥullah, pl. ḥulal: A dress which covers the entire body consisting of two garments. See: '*al-talkhīṣ fī ma'rīfat asmā' al-ashyā'*' of Abū Hilāl al-'Askarī al-Ḥasan b. 'Abd Allāh (d.395.), p.216, Dār Ṣādir, Beirut, 2nd edition, 1993, edited Dr.

‘Izzat Ḥasan; and ‘*Muḥīṭ al-Muḥīṭ*’ of Buṭrus al-Bustān ī: p.189, Librairie du Liban, 1974.

Ibn labūn: See ***Bint labūn***.

Ibn makhāḍ: See ***Bint makhāḍ***.

Iḥṣān: Linguistically carries the meaning of prevention, and chastity, and marriage, and freedom. See: ‘*qāmūs al-muḥīṭ*’: p.1190. The meaning of ***iḥṣān*** in the chapter on slander differs from its meaning in the chapter on the punishment of the adulterer. See ***muḥṣan***.

Imām: The person who leads the prayer. Also, a man i.e. scholar or leader, who has been taken as an example.

Isnād: The relating of the chain of narration of the text of a *ḥadīth*. See: ‘*Nuzhat al-naẓar*’: p.7.

Jadha‘a: The female camel that has completed four years of its life and has entered the fifth. See: ‘*al-muḍī*’: p.124.

Jayyid: Carries the same meaning as *ṣaḥīḥ* according to a group of scholars. However, some scholars use the term to refer to a degree between *ṣaḥīḥ* and *ḥasan*. See: ‘*Tadrīb al-rāwī*’ of al-Suyūt ī: p.1:194.

Jizyah: The wealth taken from a *dhimmī* each year in exchange for his security and abode in *dār al-Islām*. See: ‘*al-mawsū‘ah al-fiqhiyyah*’: 15:150, 30:101.

Kharāj: This is the wealth incumbent upon the lands of the *dhimmīs*. It differs from the *jizyah* q.v. in that the *jizyah* is a head tax whereas the *kharāj* is a land tax, and the *jizyah* is invalidated by the acceptance of Islām whereas *kharāj* remains. See: ‘*al-Mawsū‘ah al-fiqhiyyah*’: 15:152. *Kharāj* has another meaning being the state’s sources of wealth. See: ‘*al-mawsū‘ah al-fiqhiyyah*’: 19:52.

Khums: A one-fifth portion tax. The *khums* is taken from four things: war booty, *fay’*, *salab*, *rikāz*. See: ‘*al-mawsū‘ah al-fiqhiyyah*’: 20:10.

Laysa bihi ba's: An expression used for the narrator of *ḥadīth* whose accuracy is slightly questioned and his *ḥadīth* is at the level of *ḥasan* but not *ṣaḥīḥ*. This is the third level of reliability according to al-Dhahab ī.

Layyin: The description of a narrator of *ḥadīth* as being *layyin* points to the existence of a slight weakness in him, and his *ḥadīth* is considered *ḍa'īf*. This corresponds to the fifth level of invalidity according to al-Dhahab ī (see table). The *ḥadīth* rises to the level of *ḥasan* when it is found related in another similar or better *isnād*.

Madhhab: Method; creed. See: '*al-qāmūs*': p.86. It also means the decisions and preferences of a scholar. The later scholars of jurists school use the word *madhhab* with the intention of meaning the legal opinion or the most likely amongst them. See *Mawāhib al-Jalīl sharḥ mukhtaṣar Khalīl*, vol. 1, p.24.

Majhūl: There are two types of *majhūl*: (a) *majhūl al-'ayn* which is a person mentioned by a single narrator and not authenticated by anyone. (b) *Majhūl al ḥāl* which is a person mentioned by two or more narrators but not authenticated. He is also named *mastūr*. See: '*Nuzhat al-naẓar sharḥ nukhbat al-fīkar*' of Ibn Ḥajar, p.80.

Mujtahid: A scholar exercising his own independent judgement.

Matrūk: A person accused of lying. This is the second level of invalidation according to al-Dhahab ī. See: '*mabāḥith fī 'ilm al-jurḥ wa al-ta'dīl*' of Qāsim Al ī Sa'd: p.87, Dār al-Bashā'ir al-Islām īyyah, Beirut, 1988; and *Nuzhat al-naẓar sharḥ nukhbat al-fīkar*' of Ibn Ḥajar, p.44. edited Muḥammad al-A'dham ī, Maktabah al-Turāth, Egypt.

Mawqūf: This refers to the *ḥadīth* attributed to a Prophetic Companion.

Mūḍīḥah: A head wound that exposes the white bone of the skull. See: '*al-Qāmūs al-muḥīṭ*': p.367.

Mudallis: The narrator to whom *tadlīs* is attributed, *tadlīs* meaning to relate what one has not heard from someone else in a way that makes it seem possible that he may have heard it.

Muḥṣan: The *muḥṣan* in the chapter on the punishment of adultery refers to the man who has had sexual intercourse with his Muslim or *dhimmī* wife through a correct marital arrangement both of the pair being of age and of sound mind and freepersons. See: ‘*al-Rawḍ al-murbi‘ sharḥ Zād al-mustaqni‘*’, with the marginal notes of Ibn Qāsim: 7:313-314. The meaning of *muḥṣan* in the chapter on slander is the Muslim freeman of the age of maturity and chaste who has sexual intercourse with one similar without the condition that he be of the age of reason. See: ‘*al-Rawḍ al-murbi‘ sharḥ Zād al-mustaqni‘*’, with the marginal notes of Ibn Qāsim: 7:332-333; and ‘*al-Mawsū‘ah al-fiqhīyah*’: 2:222-225.

Munkar al-ḥadīth: See *munkar*.

Munkar, pl. Manākīr: A narrator who use to commit excessive errors in his narration or his immorality is so obvious his narration is said to be *munkar*. His *ḥadīth* is held to be extremely weak and it cannot be used as evidence and it is not taken into consideration. See: ‘*Nuzhat al-naẓar*’: p.44; The term is also applied to the *ḥadīth* related solely by a single weak (*ḍa‘īf*) narrator. See: ‘*al-Mūqīẓah*’ of al-Dhahab ī: p.42, 77.

Munqaṭī‘: Refers to a *ḥadīth* whose chain of narration is missing one ore more narrators.

Mursal, pl. marāsīl: Refers to a *ḥadīth* related by a *tābi‘ī* q.v. See: ‘*Nuzhat al-naẓar*’: p.36-37.

Muḍṭarib: Is a *ḥadīth* in which the transmitting authority differed and it was not possible to prefer one narration to another, as both narrators were of equal standard. This defect occurs sometimes in *isnād*, sometimes in *matn* and sometimes in both. See the commentary on *ḥadīth* 19. Also Azami M.M, *Studies in Hadith Methodology and Literature*.

Muḍlim: Applied to the extremely weak *isnād*.

Nisāb: Linguistically meaning the origin and source. In monetary *niṣāb al-māl* terms it applies to the amount that is mandatory for *zakāt*. *Niṣāb al-sariqah* refers to the minimum amount *stolen* that warrants *ḥadd* punishment q.v. See: ‘*al-Qāmūs al-muḥīṭ*’: p.138; and ‘*al-Mughnī*’ of Ibn Qudāmāh: 12:434.

Qasāmah: An oath sworn to the blood relatives of the victim if they accuse others of killing him. See: 'Mu'jam maqāyīs al-lughah': 5:86; and 'al-mawsū'ah al-fiqhīyah': 33:166-167.

Qawad: Retaliation.

Qīšāš: Retaliation.

Qaza: Shaving one's head and leaving the forelock or other tuft of hair here and there.

Sadaqah: Alms donated for the sake of Allāh. See: 'Qāmūs al-Muḥīṭ': p.900.

Ṣaḥīḥ: Refers to a *ḥadīth* whose chain of narration is sound and correct and is free from defect and irregularity. See: 'al-Mūqīṣah': p.24.

ṣa': a measure = 2.5 kg approximately.

Shāhid pl. **shawāhid:** A *ḥadīth* whose wording or meaning is identical to another, but the narrator Companion is different in both.

Shaykh: In the Arabic language refers to one above the age of fifty. It is also used as a term for anyone who is a source of knowledge, or as Ibn Rajab said: 'They (i.e. *Shaykhs*) are of a lesser degree than that of Imām and *ḥafīẓ* and they may be reliable or not. See: 'Sharḥ 'ilal al-Tirmidhī': p.256, edited Ṣubḥ ī al-Samārā' ī. According to al-Dhahab ī the term refers to the lowest level of authenticity being the fourth level (see table). See also: 'mabāḥith fī 'ilm al-jurḥ wa al-ta'dīl' of Qāsim Al ī Sa'd: p.39.

Sunnah: This term has a number of meanings and may be synonymous with the term *ḥadīth*. It is also said: The Qur'ān and **sunnah**. It may also be used with the intention of meaning recommended (*mustaḥabb*) and this is a term of the Jurists. It also may be used to mean the way or method.

Ta'zīr: In the Arabic language the word means prevention. The term of *fuqahā'* means discipline. It is mandatory in every crime in which no mandatory *ḥadd* q.v. or expiation is stipulated such as contacting a foreign woman without coition and abusing others with swear words other than adulterer. . . See: 'al-Rawḍ al-murbi' *sharḥ Zād al-mustaqni'*, with the marginal notes of Ibn Qāsim: 7:346.

Tābi' ī, pl. Tābi' īn: Refers to one who met a Prophetic Companion.

Thayyib: a man or a woman who has been married. See *muḥṣan*.

Thiqāh, pl. thiqāt: The narrator who fulfils all the conditions of authenticity and accuracy.

Wāhī: sāqiṭ, matrūk : The fourth level of invalidity according to al-Dhahab ī. His *ḥadīth* is not used as evidence and he is not taken into consideration. See: ‘*Tadrīb al-rāwī*’ of al-Suyūṭī: 1:409; and ‘*al-Qāmūs al-muḥīṭ*’ of al-Fayrūzabādī: p.1344.

Wahm, pl. awhām: A mistake, or imagining something that is not in reality the case.

CHAPTER 1. INTRODUCTION

1.1 RATIONALE FOR PROPOSED RESEARCH AREA

There has been a great deal of discussion about Islam in recent times. This is for a number of reasons. These reasons include the wars which have taken place on religious grounds in Europe and Asia; the appearance of certain states which claim to adhere to Islamic law; the spread of Islamic missions and movements in the western world which call to Islam; and the perpetration of acts of violence by those who are associated with Islam, or from those non-Muslims who are against Islam, for example the taking of hostages or the hijacking of airliners, the killing of civilians, or the planting of bombs in public places and so on. All of this creates 'news' which is carried daily by the media in all its forms; visual, audio and printed. This in turn creates both positive and negative — though mainly negative— images of Islam and Muslims in the minds of non-Muslims. It may even have an effect upon the minds of those Muslims themselves who do not have the benefit of a complete knowledge of Islam. It is no secret that many of those who invite non-Muslims to Islam do not give the correct image of Islam, either out of ignorance, or out of a weakness in adhering to its commandments. Some even deliberately conceal certain aspects of the religion or attribute to it that which has no part in the religion out of fear that others may reject the religion. This is in my opinion the worst of things in that it comprises ignorance of Allah and His Messenger, and

ignorance of the tolerance of this religion, and deliberately forging lies against Allah and His Messenger which is one of the most major sins. Certain people think that what is meant by 'obstructing the way of Allah' is confined to extremism in religion and demonstrating violence and severity. This is a mistake. Obstructing the way of Allah, as well as occurring because of extremism can also occur because of neglect and speaking about Allah without knowledge. For example, there are some people who hold the opinion that killing innocent civilians such as women and children is permissible. This is wholly contrary to the authentic *ḥadīths*, the actions of the Companions and the framework of human norms. Moreover such a stance would inevitably rouse the anger of both individuals and communities against Muslims and Islamic religion. Another example is when at times a form of marriage called '*zawāj al-muḥallil*'¹ has become

¹ '*Nikāḥ al-muḥallil*' is a prohibited ploy which is undertaken by the family of a woman who has been divorced three times. They marry her to another person, not with the intention of normal marriage but rather with the intention of making her lawful for her original husband. This because the woman who has been divorced three times is not lawful for her original husband until she marries another man in a correct and lawful marriage who then divorces her by his own will or dies. It is in the *ḥadīth* that if anyone undertakes marriage solely for the purposes of making the woman lawful again is accursed. This was related by many Companions as follows:

1. from 'Alī b. Abī Ṭālib it was related by Aḥmad, *al-Musnad*, no. 636; al-Tirmidhī, no. 1119. Abū Dāwūd, no. 2076, Ibn Mājah, no. 1935.

2. from 'Abd Allah b. Mas'ūd it was related by al-Nasā'ī, 3416, Aḥmad, 4271, al-Tirmidhī, 1120.

widespread, this has been a cause of obstructing non-Muslims from entering Islam. Many people have used this as a pretext to censure and blame Muslims and have said: "The Prophet of the Muslims said to them that if one of them divorces his wife she would not be lawful for him again until she commits adultery."² However the Prophet is innocent of such a statement as are the Prophetic Companions and those who followed them as well as the majority of Muslim scholars. This form of marriage is not correct and is not to be found in any religion and the true believers find it detestable. Hence, it is very important that Islam be exhibited by way of its original sources such as the Holy Qur'ān and the authentic traditions, and that it be understood by way of the classical books authored by the great and reliable scholars so that the distinction may be made between the Divine Islamic Law as sent down by Allah which is not liable to error, and the opinions of scholars and jurists and the behaviour and practice of Muslims which may be susceptible to truth as well as error, and are areas of discussion and argument.

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3. from Abū Hurayrah it was related by Aḥmad, 8088.

4. from Ibn 'Abbās it was related by Ibn Mājah, 1934.

It is also something rejected by the intellect and sound human nature. See: Malik, *al-Muwatta'*, p. 212 translated by Aisha Bewley, Madina press, Granada, Spain 1992.

² See Ibn Taymiyyah, *Majmū' al-Fatāwā*, 32:156; Ibn al-Qayyim, *'I'lām al-Muwaqqi'īn*, 3:41-43.

The state of Muslims today differs from that of the past in several ways. One difference is that the scientific, economic, political and military power of the Muslims was accompanied by the practical implementation of Islam which made Islam the goal of every people on Earth. This is the reason which motivated me to choose this rare manuscript and to examine and edit one of its sections about which there is so much discussion, the section being the one dealing with *jinayāt* (crimes), *ḥudūd* (statutory punishments), and *jihād* (holy war) and which explains a number of issues in which the Muslim scholars have differed. This is a work which few researchers have undertaken with the Arabic language.

1.2 RELATIONSHIP BETWEEN PROPOSED RESEARCH AND PREVIOUS RESEARCH

This research is very valuable in that it is a new work in the western academic field presenting in a translated and edited form one of the original and authentic books on Islamic law, which dates back to the 6th to 8th centuries AH. It is needed by many specialist researchers as well as by Muslims who do not have the benefit of the Arabic language and who desire a knowledge of the delicate points of Islamic law free from adulteration which may at times be intentional or unintentional on the part of both non-Muslims and Muslims themselves.

The manuscript '*Tanqīh al-Taḥqīq fī aḥādīth al-Ta'ālīq*' is a very valuable document in the hand of the author Abū 'Abd Allah Muḥammad b. Aḥmad al-Dhahabī. It is a manuscript not previously translated or edited in a scholarly fashion. After I had begun my editing I came across an edition of the manuscript edited by 'Abd al-Mu'ṭī Qal'ajī printed by Dār al-Wa'y al-'Arabī and Maktabat Ibn 'Abd al-Barr, Aleppo, 1st edition July 1998. This book comprises 12 volumes and contains the book '*al-Taḥqīq fī masā'il al-khilāf*' of Ibn al-Jawzī, and the book '*Tanqīh al-Taḥqīq*' of al-Dhahabī along with indices and a study. I examined this printing and found it to be a poor edition lacking in scientific rigour. I would make the following observations on this edition:

The editor of the book is not a specialist in this science. Every science has its specialists, without doubt, and those who know its terminology and who are concerned with publishing it and editing it. If those who are not qualified undertake such work then they are liable to make grave mistakes through their lack of understanding.

Qal'ajī's work is limited to numbering the prophetic traditions in al-Dhahabī's '*Tanqīh*' by giving them the same numbers as that of Ibn al-Jawzī's '*Taḥqīq*'. Then he puts al-Dhahabī's book in the lower part of the page and Ibn al-Jawzī's book in the upper portion despite the fact that al-Dhahabī provided more traditions than the '*Taḥqīq*' and abbreviates it. This means that al-Qal'ajī's work consists of no more than reprinting the manuscript, but in a distorted and corrupted form.

Despite this, al-Qal'ajī work was beneficial to some degree in my research. Specifically, certain words which were difficult to comprehend from the manuscript were clearly elucidated in the print version. Nevertheless, I have not relied totally on the print version. For the purpose of accuracy I compared excerpts from the print version with other *ḥadīth* and jurisprudential sources.

1.3 METHODOLOGY OF RESEARCH

The thesis comprises an introduction, three chapters, and a conclusion.

The Introduction reviews a number of topics related to the science of *fiqh* controversy, its nature, etiquette, and the major books written in this discipline.

It also reviews the fundamentals of Imam Ahmad's school of jurisprudence and provides a brief biography of each of the three authors who contributed to this book, namely, al-Qāḍī Abū Ya'lā who wrote the original book *al-Ta'līq al-kabīr*, Ibn al-Jawzī who edited it in his book *Taḥqīq al-Ta'līq* and al-Dhahabī who revised *Taḥqīq al-Ta'līq* in his book *Tanqīḥ al-Taḥqīq*. The introduction also provides a description of the methodology of these three authors in their respective books.

Given the considerable bulk of *Tanqīḥ al-Taḥqīq fī Aḥādīth al-Ta'līq*—a preliminary edition of the manuscript in Arabic resulted in a typescript of over 500 pages—I have

chosen to study three chapters in particular for this thesis. These I have selected on the basis of their significance and their relevance to contemporary issues which have been the object of much controversy and have given rise to many misconceptions and criticisms about Islam. These three chapters are: Crimes, Punishment and War.

I have done the following concerning these chapters:

- (i) I have typed out the Arabic text, using the necessary diacritics for all the words.
- (ii) I have translated the Arabic text into English.
- (iii) I have numbered the titles of the chapters, the *fiqh* issues and the prophetic *ḥadīths* and put the numbers between brackets [] for ease of reference.
- (iv) I have verified the chains of transmission of all the *ḥadīths*, attributed them to the major books of *ḥadīths* and judged them in terms of whether they are authentic or weak, based on the fundamentals of this science and on the verdicts of scholars of *ḥadīth* before me.
- (v) I have also commented on the *fiqh* issues, explaining and elucidating them. The issues of *fiqh* in the book need such treatment because they are written in a very

specialized *fiqh* language, sometimes quite inaccessible to the nonprofessional because it is too concise.

(vi) I have further discussed the evidence used to support the arguments and indicated which ones are to be favoured in my view in the light of the legal evidence available. I have mainly quoted opinions from the old sources relied upon by the four major schools of *fiqh* i.e. the Ḥanafīs, Mālikīs, Shāfi'īs and Ḥanbalīs. I have tried to steer clear from the opinions of contemporary Muslim scholars, which I have only referred to for comparative purposes. My aim in all of this is to present the *fiqh* issues the way they were presented by those scholars who lived in the golden age of Islam, who enjoyed much more intellectual freedom and political sovereignty. They should, undoubtedly, be more truthful and more forthcoming than other scholars and thinkers. I have also aimed to highlight agreed upon issues, as *ijmā'* (consensus) is a very important source of Islamic jurisprudence, and represents constant and fixed elements of Islam which are above controversy and discussion.

(vii) Since the core of the present study has to do with *ḥadīth*, it has not been possible to comment on all the *fiqh* issues. Instead, I have selected those issues which, in my view, are the most significant. Besides, investigating each and every one of them would be far beyond the scope of this study.

(viii) I have used a bold font for the text of the manuscript and put any added elucidating comments between brackets []. As for explanatory comments, which are my work and not that of the author, I have presented them in normal type in the body of the thesis, following each *fiqh* issue.

(ix) I have referred each *ḥadīth* to its original sources in the footnotes, with an indication at the beginning of the footnote of the rank of each *ḥadīth* in terms of authenticity and weakness.

(x) For the translation of the meanings of the Quranic verses, I have used *The Noble Qur'an, A New Rendering of its Meaning in English* by Abdalhaqq and Aisha Bewley.

(xi) For the six books of *ḥadīth* i.e. al-Bukhārī, Muslim, Abū Dāwūd, al-Tirmidhī, al-Nasā'ī and Ibn Mājah, I have used the edition of Dār al-Salām, which combines these six books in one volume. This particular edition is numbered and ordered according to the *al-Mu'jam al-Mufahras* and *Tuḥfat al-ashrāf* of al-Mizzī Jamāl al-Dīn (d.742/1341).

(xii) Finally, whenever *al-Mawsū'ah al-fiqhiyyah* is mentioned in this study, it refers to the *fiqh* Encyclopedia, compiled by a group of researchers from the Ministry of

Endowments and Islamic Affairs in the State of Kuwait. Thirty nine volumes of this Encyclopedia have been published so far.

CHAPTER 2: SCIENCE OF CONTROVERSY

2.1 THE SCIENCE OF CONTROVERSY EXPLAINED

2.1.1 INTRODUCTION

Disagreement amongst human beings is a reality and a natural trait, as well as being a part of the universal divine will and decree. For Allah Almighty has created the children of Adam with differences in their colours, appearances, and languages, and indeed in their capacities and natural dispositions, so that one cannot find two individuals who match each other in every thing even though they may match in many things. Allah Almighty says: “Among His Signs is the creation of the heavens and the earth and the variety of your languages and colours. There are certainly Signs in that for every being.”¹

Although disagreement may be inevitable, consensus and agreement are possible and within the capacity of human kind. Hence, Allah has ordered it in many Qur’anic verses, and the Prophet enjoined it in many texts. Amongst these are: “Hold fast to the rope of Allah all together and do not separate.”² and He Almighty said: “This nation of yours is one nation and I am your Lord, so worship Me.”³

¹ *al-Rūm*, 30:21.

² *Āl ‘Imrān*, 3:103.

³ *al-Anbiyā’*, 21:91.

Indeed Allah Almighty has criticised disagreement and has warned of its severe consequences for the individual and society when He said: "Do not be like those who split up and differed after the Clear Signs came to them. They will have a terrible punishment."⁴ Here He warns against being like the Jews and the Christians who split into many sects and who deserved punishment for this. This shows that those who split from this nation warrant punishment just as those who did from previous nations. He said: "Obey Allah and His Prophet and do not quarrel among yourselves lest you lose heart and your momentum disappear."⁵ Hence failure and loss of wind, meaning loss of power and state and the disunity of society, are the consequences of disputes as is shown by the grammar of the verse.

Allah Almighty also said: "As for those who divide up their *dīn* and form into sects, you have nothing whatsoever to do with them."⁶ Here Allah exonerates His Prophet from being part of those who cause splits in the religion – the Jews and Christians, although the Prophet had told of what would befall this nation, like previous nations, in articles of faith, opinions and actions, and that there would be those from this nation who would cause splits in their religion like those before them. This verse

⁴ *Āl 'Imrān*, 3:105.

⁵ *al-Anfāl*, 8:47.

⁶ *al-An'ām*, 6:160.

shows that the Prophet is exonerated from those from this nation who cause a split in their religion.

This being the case, then the Muslim and indeed the non-Muslim alike should be aware and on his guard, realising the danger of controversy and striving to put an end to it, and if he is not able to do this then he should at least minimise it, and if he is not able to do this then he should avoid its consequences. And let him seek succour in this matter through the light of the Qur'an and the *sunnah* and ask his Lord for guidance and success as did the Prophet when he stood during the night saying: “*allāhumma* Lord of Jibrā'il, and Mīkā'il and Isrāfīl, Originator of the heavens and the earth, Knower of the Unseen and the Visible, You will judge between your slaves regarding what they differed about. Guide me in that which there is disagreement by your permission. Verily You guide whomever You wish to the straight way.”⁷

2.1.2 DEFINING THE SCIENCE OF CONTROVERSY

Linguistically, it is a controversy that occurs between two disputants in order to bring to light the truth or to disprove falsehood.⁸

In the terminology of scholars, this science has been defined by a number of names, amongst which are: (i.) The Science of Controversy, and (ii.) Commentary on

⁷ *ṣaḥīḥ*. It was related by Muslim, 770; Abū Dāwūd, 766; al-Tirmidhī, 3420; Ibn Mājah, 1357.

⁸ al-Sharīf al-Jurjānī 'Ali b. Muḥammad “*al-Ta'rīfāt*” p.101, Dar al-Kutub al-'Ilmiyya, 1983.

Controversial Issues. In our era, the name (iii.) Comparative Jurisprudence⁹ has been given to it. Some scholars named their books about controversy '*uyūn al-masā'il* or *ru'ūs al-masā'il*'.¹⁰ All of these names go to show that this is a single art, which can be defined as being: "A science through which is known the method of bringing forth legal proofs and dispelling ambiguity and false evidence by bringing forth decisive evidence."¹¹

It is a science which arose as a result of the appearance of the different juridical schools in Ḥijāz and 'Irāq, in Egypt and Syria, and in Morocco and Andalusia as well as other parts of the Islamic world. Each of these schools had their own scholars and jurists who laid down their principles and defended their own legal opinions. Amongst the principles of scientific reasoning to prove the correctness of a philosophy or opinion, whatever that may be, was the bringing forward of evidence to prove the correctness of an opinion and to dispel any objections to it, and to dispel the proof of the opponents who held that it was false. Because of this there arose amongst Muslims what is called '*ilm al-jadal*' (dialectic). The science of controversy is a branch of dialectic with the exception that it specialises in legalistic matters.

⁹ See Subḥī al-Sāmarrā'ī in his foreword to the '*Ikhtilāf al-'ulamā'*', of Muḥammad b. Naṣr al-Marwazī, p.8, Beirut: 'Ālam al-Kutub, 1985.

¹⁰ See Bakr b. 'Abd Allah Abu Zayd, *al-Madkhal al-Mufaṣṣal*, 2:900.

2.2 THE SIGNIFICANCE OF THE SCIENCE OF CONTROVERSY

There is a great amount of importance and immense benefit attached to what was written by the scholars of the juridical schools about the science of controversy. This is what moved Ibn Khaldūn to say: "It is indeed a science of majestic worth."¹²

Among its benefits are:

1. The great number of Prophetic *ḥadīths*, and traditions of the Companions of the Prophet and the *Tābi'īn* that the books composed about this science contain. This will become clear from an investigation of the books of *takharīj* which have been compiled about each of the famous juridical schools.¹³ The *ḥadīth* and traditions present in these books differ from the other collections of *ḥadīth* such as the Six Books and others, in that the *ḥadīths* in the books of jurisprudence deal with a single subject, namely, *aḥādīth al-aḥkām* (the *ḥadīths* of legal rulings.)

2. These books make clear the method of deducing the legal rulings from this evidence, and how each *Imām* sometimes uses the selfsame evidence to prove his

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¹¹ See 'Abd al-Qādir b. Badrān, *Al-Madkhal ilā Madhhab al-Imām Aḥmad b. Ḥanbal*, p.450, ed.

'Abd Allah al-Turkī, Beirut: Mu'assasah al-Risālah, 1985.

¹² Ibn Khaldūn, *al-Muqaddimah*, p. 456. Beirut: Dār al-kutub al-'ilmiyyah, 4th printing, 1978

¹³ See for example al-Zayla'ī, *Naṣb al-rāyāh*; and Ibn Ḥajar al-'Asqalānī, *al-Talkhīṣ al-ḥabīr*.

madhhab that an opponent uses to prove his own *madhhab*, of which Ibn Khaldūn said:

It is indeed a science of majestic worth in the knowledge of the stances that the Imams took and the evidence they brought forth and for training those studying the science in the method of reasoning used by it.¹⁴

3. This science also encompasses general legal principles, and the reasons behind the legal rulings and issues, and the areas of consensus and agreement, as well as disagreements of opinion, narration, or aspect within each *madhhab*.¹⁵

4. Among the products of this science was the flourishing of that which has subsequently been called 'The Scholastic Method', which became the foundation of the universities in the Islamic world and one of the pillars upon which Thomas Aquinas built his school, or at least the educational method which was named after him.¹⁶

5. Also among the fruits of these juridical schools, and because of the intellectual hypotheses that the *mujtahid* would propose at that time, either simply for intellectual

¹⁴ Ibn Khaldūn, *al-Muqaddimah*, p. 456-457.

¹⁵ See Ibn Khaldūn, *al-Muqaddimah*, p. 456; al-Nawawī, *al-Majmū'*, 1:5; Ibn Taymiyyah, *Majmū' al-Fatāwā*, 20: 227-228; and Bakr b. 'Abd Allah Abū Zayd, *Al-Madkhal al-Mufaṣṣal*, 2:899.

¹⁶ See Professor George Makdisi, *The Rise of Colleges as Institutions of Learning in Islam and the West*, Edinburgh University Press, 1981.

exercise or in expectation of the criticism that a prospective opponent might bring forward, was that certain ideas produced solutions to many contemporary cases.

2.3 BOOKS COMPILED ON CONTROVERSIAL ISSUES

Controversy about *fiqh* issues appears relatively early in the history of Islam. One can trace it back to the days of the Prophet, although at this stage *fiqh* was not based on *ijtihād* (independent judgment in a legal question), but rather on following the Qur'ān and the *sunnah* in all matters of legislation, including creed, morals, worship, transactions, international relations and family affairs. It is true that some of the Companions exercised their *ijtihād* to reach certain verdicts in given situations.¹⁷ Such *ijtihād* was legitimate at times, as in the case of Mu'ādh b. Jabal when the Prophet sent him to Yemen¹⁸, but was not legitimate at other times, as in the case of the labourer who committed adultery with the wife of his boss.¹⁹ Any controversy arising between the Companions, however, came to an end as soon as the Prophet was resorted to, where his verdict was taken as the final one. However, after the demise of the Prophet, controversy occurred as a result of other factors, already

¹⁷ See for example, the *ḥadīth*: "No one should pray *'aṣr* except after reaching *banī Qurayẓah*" This *ḥadīth* was related by al-Bukhārī, No.946, Muslim, No.1770. See also the *-ḥadīth* of the two men who were due to pray and did not have water, they prayed then; one of them prayed again after finding water while the other did not. See the whole story in Abū Dāwūd 338 p. 1248. Abū Dāwūd commented saying: "It is *mursal* (i.e. incompletely transmitted)." Also, the *ḥadīth* of 'Umar and 'Ammār with regard to *Tayammum*, where 'Umar wiped all over his body with sand, while 'Ammār only wiped over his face and hands. This *ḥadīth* was related by al-Bukhārī, no. 347 p. 30.

¹⁸ See Aḥmad's *Musnad*, 5:230. al-Bukhārī said about it: "It is not authentic, it is *mursal* (i.e. incompletely transmitted.)" *al-Tārīkh al-kabīr*, 2:277. A number of other jurists authenticated it because it is well known among the scholars and approved by them. See al-'Asqalānī Ibn Ḥajar, *Muwāfaqat al-khubr al-Khabar fī takhrīj al-ḥadīth al-Mukhtaṣar*, 1:117.

detailed in “Chapter 1” of this thesis. Such controversy continued to grow among the scholars, both in volume and scope with the passage of time, until such time came when people felt an urgent need to document and write down the controversial issues of *fiqh*. This is because at that time, controversy in *fiqh* matters became a well defined phenomenon marked by the emergence of different schools of thought (*madhāhib*) headed by well known Imams, with followers and students who subscribed to their opinions and defended and advocated these opinions. Consequently, a number of books appeared, specifically written to document and discuss controversial *fiqh* issues and not featuring other issues which were agreed upon.

Apparently, this new type of literature was an attempt by its authors to put side by side the different opinions in order to reach the correct verdict in given issues. This is because the common criterion used by all scholars to weigh the different opinions to determine whether they are right or wrong is the same and that is the Qur’ān and the authentic *sunnah*.

It is, therefore, not surprising to see some scholars change their *madhhab*, like Abū Ya‘lā who started as Ḥanafī and ended up as Ḥanbalī, al-Ṭaḥāwī Abū Ja‘far Aḥmad

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¹⁹ This *ḥadīth* is known as the *ḥadīth* of al-‘asfī (the labourer), It is *ḥadīth* no. 82 of this treatise.

b. Muḥammad b. Salāmah, (d.321/933) who switched from the Shāfi'ī *madhhab* to the Ḥanafī *madhhab* and al-Khaṭīb al-Baghdādī who left the Ḥanbalī *madhhab* to join the Shāfi'ī *madhhab*.²⁰ It is also common to find some scholars who, while remaining in their *madhhab*, disagreed with their Imams, as in the case of Abū al-Ḥasan al-Shaybānī and Abū Ḥanīfah. This is because the loyalty of every just and fair scholar is not primarily to his teacher, but to conveying the knowledge entrusted to him by Allah to the people, for, indeed, "The scholars are the inheritors of the Prophets."²¹

Ibn Ḥazm al-Andalusī (d.456/1064) further mentioned another reason why the scholars compiled books on controversial matters and that was to deter anyone from claiming that a given issue is unanimously agreed upon, so as to prevent other scholars from exercising their *ijtihād* and thus reaching a different verdict on a given issue. The scholars have also written books on issues unanimously agreed upon in order to deter future eccentricity and deviation.²²

The first books in this discipline could well have been written in the 3rd / 9th century, as is the opinion of Ibn Taymiyyah who says:

²⁰ See Bakr Abū Zayd, *al-Madkhal al-Mufaṣṣal*, 1:567-572.

²¹ The expression "The scholars are the inheritors of the Prophets" is part of a *ḥadīth* related by Abū Dāwūd, No.3641 p. 1493, al-Tirmidhī, No.2682 p. 1922 and Ibn Mājah, No.223 p. 2491.

After the third century, the controversial issues were singled out, most probably by Abū Bakr al-Ṣayrafī²³ who was followed by others, to the point that a great many books were compiled specifically on controversial issues. Most of these writers, however, restricted themselves to issues contested between Abū Ḥanīfah and al-Shāfi'ī.²⁴

The first scholar, however, who is known to have written a book on the subject of controversial issues was Imam al-Shāfi'ī (d.204/820). He wrote his book *Ikhtilāf al-'irāqiyyīn* where he reported the issues disagreed upon by Abū Ḥanīfah and Ibn Abī Lalyā Muḥammad b. 'Abd al-Raḥmān (d. 148/765).²⁵ He also wrote a second book, entitled *Ikhtilāf Mālik wa al-Shāfi'ī*.²⁶ After, Imam al-Shāfi'ī, his students followed suit, such as, al-Buwayṭī (d. 231/846)²⁷, Abū Thawr al-Kalbī (d.240/855), al-Rabī' b.

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²² See Ibn -Hazm, *al-Iḥkām fī uṣūl al-aḥkām*, 4:506.

²³ He is Muḥammad b. 'Abd Allah al-ṣayrafī al-Baghdādī, died in Egypt in 330/942. See Kaḥḥālāh , *Mu'jam al-mu'allifīn*, 3:442.

²⁴ See: Ibn Taymiyyah, *al-Istiḳāmah*, ed. Muḥammad Rashād Sālim, 1:62-63, 1st. edition, 1983, Imam Muḥammad b. Su'ūd University edition

²⁵ See al-Dhahabī, *Tadhkirat al-ḥuffāẓ*, 1:171.

²⁶ See al-Byhaqī, *Manāqib al-Shāfi'ī*, 1:264.

²⁷ Yūsuf b. Yaḥyā al-Buwayṭī. He was a Mālikī scholar, then he switched to the Shāfi'ī *madhhab*. He succeeded his teacher, al-Shāfi'ī in teaching and issuing *fatwās* after the latter's death. See: al-Dhahabī, *Siyar a'lām al-nubalā'*, 12:58 and al-Nawawī, *Tabaqāt al-fuqahā'*, 559-561 and Kaḥḥālāh, *Mu'jam al-Mu'allifīn*, 4:188.

Sulaymān (d.270/884), then other scholars from different schools of jurisprudence did the same.²⁸

From among the Ḥanafīs, the first to write on this discipline was Abū Ja'far Aḥmad b. Muḥammad b. Salāmah al-Ṭaḥāwī, (d.321/933). He wrote his book *Ikhtilāf al-fuqahā'*²⁹ and another book entitled *Sharḥ ma'ānī al-'āthār*.³⁰ In his introduction to this latter book, al-Ṭaḥāwī explains the reason behind compiling it:

A friend of ours, one of the people of knowledge, requested if I could write him a book where I would report the traditions narrated from the Messenger of Allah which are mistakenly thought by the atheists and those of weak faith from among the Muslims to contradict each other. Such erroneous judgment is due to these people's lack of knowledge with regard to which of these traditions is abrogating and which is abrogated and with regard to which should be acted upon on account of other supporting textual provision from the Qur'ān and the unanimously agreed upon *sunnah*. He further asked to divide the book into chapters and would report in each chapter the relevant abrogating and abrogated traditions, the interpretations of the scholars, their arguments and counter arguments and would finally favour the opinion of the scholar whose arguments looked authentic to me on account of supporting evidence from the Qur'ān, the *sunnah*, *ijmā'* or the sayings of the Companions or their successors...³¹

²⁸ See Ibn Taymiyyah, *al-Istiqāmah*, ed. Muḥammad Rashād Sālim, 1:62-63, 1st. edition, Riyadh: University of Imam Muḥammad b. Su'ūd, 1983.

²⁹ This book was printed by the Institute of Islamic Research in Islamabad, 1971 in 314 pages with an introduction in English. Ed. Muḥammad al-Ma'sūmī.

³⁰ This book was printed in Beirut, first edition, 1994. Ed. Muḥammad Zuhri al-Najjār and Muḥammad Sayyid Jād al-Ḥaqq form al-Azhar University. Indexed by Dr. Yūsuf al-Mar'ashlī.

³¹ See al-Ṭaḥāwī, *Sharḥ ma'ānī al-'āthār*, 1:9.

As for the first from among the Mālikīs to contribute to this discipline, it was al-Aṣīlī ‘Abd Allah b. Ibrāhīm al-Andalusī (d.392/1002), with his book *al-‘Āthār wa al-dalā’il ‘alā ummahāt al-masā’il* where he reported the controversies between Mālik, al-Shāfi‘ī and Abū Ḥanīfah.³² He was followed by Ibn al-Qaṣṣār Abū al-Ḥasan ‘Alī b. ‘Umar al-Baghdādī, the Mālikī jurist (d.397/1007), who wrote his book *Masā’il al-khilāf*. Abū Ishāq al-Shīrāzī said about it: “I do not know of a better book on controversial issues.”³³

This book was subsequently abridged by al-Qāḍī ‘Abd al-Wahhāb b. ‘Alī (d.422/1031)³⁴. Another Mālikī scholar, Sulaymān b. Khalaf al-Bājī (d.474/1082) also wrote a book entitled *Masā’il al-khilāf*, but he was unable to finish it.³⁵

From among the Shāfi‘īs al-Qāḍī Abū al-Ṭayyib Ṭāhir b. ‘Abd Allah al-Ṭabarī (d.450/1058) wrote his book *al-Ta’līqah al-kubrā fī al-furū’*³⁶ which he based on

³² See: Kaḥḥālāh, *Mu’jam al-Mu’allifīn*, 2:220.

³³ See Ibn al-‘Imād al-Ḥanbalī (d.1089/1678), *Shadharāt al-dhahab*, 3:149, Beirut.

³⁴ It was printed in five volumes, Ed. Imbay b. Kiba Kah, Riyadh: 2000.

³⁵ See, Yāqūt al-Ḥamawī, *Mu’jam al-Udabā’*, 11:249.

³⁶ It was partly audited by some postgraduate students at the Islamic University in al-Madinah al-Munawwarah.

*Mukhtaṣar al-Muzanī*³⁷. His methodology in this book consists of reporting both controversial and non-controversial issues, mainly with reference to Abū Ḥanīfah and Mālik. He occasionally refers to Aḥmad or al-Awzā'ī. Sometimes, he only reports the controversy within the Shāfi'ī *madhhab*.

The first to write on this discipline among the Ḥanbalīs was Abū Ḥafṣ 'Umar b. Ibrāhīm al-'Ukburī (d.387/997), with his book *Ru'ūs al-masā'il*. Then, Al-Ḥasan b. Ḥāmid b. 'Alī al-Baghdādī (d.403/1013) wrote his book *al-Jāmi'*, said by Abū Ya'lā to consist of 400 parts.³⁸ Al-Qāḍī Abū Ya'lā also wrote his book *al-Ta'līq al-kabīr* which, will be reviewed in detail in a subsequent section of this thesis. His student, Abū Ja'far 'Abd al-Khāliq b. 'Īsā al-'Abbāsī al-Hāshimī (d.470/1078) followed suit and wrote his book *Ru'ūs al-masā'il fī al-khilāf*,³⁹ which, included 1960 controversial issues. His methodology in this book was no different from the methodology of his teacher al-Qāḍī Abū Ya'lā.

From among those who wrote in this discipline, from the other *madhhabs* was Imam Muḥammad b. Jarīr al-Ṭabarī (d.310/923), who compiled his book *Tahdhīb al-*

³⁷ *Mukhtaṣar al-Muzanī* is a textbook in Shāfi'ī jurisprudence, written by al-Muzanī Ismā'īl b. Yaḥyā (d.264/878). It is one of the most important textbooks in Shāfi'ī jurisprudence.

³⁸ See Ibn al-'Imād al-Ḥanbalī, *Shadharāt al-dhahab*, 3:166.

āthār.⁴⁰ In this book, he started with traditions related by Abū Bakr al-Ṣiddīq and their chains of narration which are judged as authentic by the author. He then pointed out the defects (if any) of each *ḥadīth*, reviewed its methods of reception, then its interpretation, the controversy around it, the arguments of the scholars, its meanings, and the meanings of any difficult words in it. Finally, he included an answer to any questions raised by the atheists related to the *ḥadīth* at hand. He completed the compilation of a number of volumes, each including the traditions related by a specific person. So he completed a volume (*musnad*) for each of the Ten People who were promised paradise, for each member of the Prophet's family who related *ḥadīths*, and for each of his *mawālī* (freed slaves) who related *ḥadīths*. He also completed part of *musnad* Ibn 'Abbās. However, he was unable to finish it due to his death. About this book, al-Dhahabī said: "Had he been able to complete it, it would have consisted of 100 volumes."⁴¹ Ibn Jarīr also wrote another book entitled *al-Basīṭ*. Part of it was a section on *ṭahārah* (ritual purity). *Al-Basīṭ* consisted of

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³⁹ *Ru'ūs al-masā'il* was edited by Dr. 'Abd al-Malik b. 'Abd Allah al-Duhayyish and printed in Beirut; 2000. See also al-Dhahabī, *Siyar a'lām al-nubalā'*, 18:456

⁴⁰ The book was printed in three parts, starting with *ḥadīths* of 'Alī b. Abī Ṭālib and finishing with *ḥadīths* of Ibn 'Abbās. Parts I and II were printed in Makkah al-Mukarramah 1982, Ed. Nāṣir al-Rashīd and 'Abd al-Qayyūm 'Abd Rabb al-Nabī. Part III was audited by 'Alī Riḏā and printed by Dār al-Ma'mūn, Beirut, 1st.edition, 1995.

⁴¹ See al-Dhahabī, *Siyar a'lām al-nubalā'*, 14:273-274.

1500 sheets, because in each of its constituent books, the author related the different opinions of the Companions and their Successors and the arguments of each one of them.⁴² It seems that Ibn Jarīr, in turn, was also unable to complete this book and it is one of his missing books. He further wrote his book *Ikhtilāf 'ulamā' al-amṣār*. al-Dhahabī, quoted 'Abd Allah al-Farghānī, the student of Ibn Jarīr (d.362/973), as saying that Ibn Jarīr managed to finish this particular book.⁴³

The books of Ibn al-Mundhir Muḥammad b. Ibrāhīm (d.318/930) were also among the most important books written in this discipline. Of particular importance were his two books *al-Awṣaṭ fī al-sunan wa al-ijmā' wa al-khilāf*⁴⁴, and *al-Ishrāf*. The latter was one of the books that Abū Ya'lā drew upon when he wrote his book *al-Ta'līq al-kabīr*. Al-Nawawī, an eminent Shāfi'ī scholar, also acknowledged in the introduction to his book *al-Majmū' sharḥ al-Muhadhdhab* that he had relied upon Ibn al-Mundhir for the *fiqh* opinions of the Shāfi'ī scholars.⁴⁵ Also the pages of Ibn Qudāmah's book *al-Mughnī Sharḥ Mukhtaṣar al-Khiraqī* are full of references to

⁴² See al-Dhahabī, *Siyar a'lām al-nubalā'* 14:273-274.

⁴³ See al-Dhahabī, *Siyar a'lām al-nubalā'* 14:273. A small part of the book was found, including the books of *jihād*, *jizyah*, and *aḥkām al-muḥāribīn*. It was printed in Cairo, 1933. Edited by the German Orientalist, Joseph Schacht.

⁴⁴ It was audited by Ṣaghīr Aḥmad Ḥanīf and printed in Riyadh 1985.

⁴⁵ See the introduction to *al-Majmū'* by al-Nawawī, 1:19.

Ibn al-Mundhir. These two authors, Ibn Qudāmah and al-Nawawī, are considered as essential reference points to all Shāfi'ī and Ḥanbalī scholars who came after them, and their two books *al-Majmū'* and *al-Mughnī* respectively are at the top of the list of resources referred to by researchers in the field of comparative jurisprudence.⁴⁶

2.4 FORMS OF CONTROVERSY

Abū Hurayrah related that the Messenger of Allah said:

The Jews will split into seventy-one sects or seventy-two sects, as will the Christians. My nation will split into seventy-three sects.⁴⁷

It is a *mashhūr ḥadīth* on the narration of another group of Prophetic Companions.

This aforementioned disagreement may be in one or both of the religion and earthly life and is a disagreement which is censured and forbidden by Allah's words:

Do not be like those who split up and differed after the Clear Signs came to them. They will have a terrible punishment.⁴⁸

⁴⁶ See Bakr b. 'Abd Allah Abū Zayd, *al-Madkhal al-mufaṣṣal ilā fiqh al-Imām Aḥmad b. Ḥanbal*, Riyadh; 1997.

⁴⁷ This was related by Abū Dawūd, Chapter: *exposition of the sunnah*, no. 4956; al-Tirmidhī, Chapter on *the splitting of the nation*, no. 2640; and Ibn Mājah, Chapter on *the splitting of the nations*, no. 3991. al-Tirmidhī said that it is *ḥasan* and *ṣaḥīḥ*.

⁴⁸ *Āl-Imrān*, 3:105.

Despite this, it was inevitable that it would occur in the Islamic nation, and indeed, the Prophet had warned us so that anyone that Allah wishes deliverance from it would save himself.

The disagreement mentioned in the Qur'ān is of two kinds. The first kind is in censuring the two parties together as in the censuring of the differing of the Christians. Allah says:

We also made a covenant with those who say: 'We are Christians' and they too forgot a good portion of what they were reminded of. So We stirred up enmity and hatred between them until the Day of Rising.⁴⁹

And the differing of the Jews as Allah says:

We have incited enmity and hatred between them until the Day of Rising. Each time they kindle the fire of war, Allah extinguishes it. They rush about the earth corrupting it. Allah does not love corrupters.⁵⁰

The second is the disagreement in which one of the two parties is praised namely the faithful, and the other is rebuked as Allah says:

If Allah had willed, those who came after them would not have fought each other after the Clear Signs came to them, but they differed. Among them there are those who have *īmān* and among them there are those who are *kāfir*.⁵¹ And He also says: Here are two rival groups who disputed concerning their Lord.⁵²

⁴⁹ *al-Mā'idah*, 5:14.

⁵⁰ *al-Mā'idah*, 5:64.

⁵¹ *al-Baqarah*, 2:251.

Among the reasons for the first kind of controversy in which both parties are rebuked are:

1. The corruption of intention because of what they hold in their souls of injustice, jealousy, and seeking lofty station in the Earth. The opinion or action of those other than him may be rebuked in order to seek superiority over him, and the opinion of those who are his equal in status or school of thought or are his compatriots or friends lauded in order to seek honour and leadership. This is common among men and is a form of oppression.

2. Ignorance, for all of the disputants may be ignorant of the truth of the matter in which they dispute or the evidence in question. They may also be ignorant of the truth that the other may hold despite the knowledge that he has himself. Ignorance and oppression are the origin of every evil as Allah Almighty says:

We offered the trust to the heavens, the earth and the mountains but they refused to take it on and shrank from it. But man took it on. He is indeed wrongdoing and ignorant.⁵³

This disagreement then may be one on the basis of diversity or disagreement on the basis of contradiction.

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⁵² *al-Ḥajj*, 22:19.

⁵³ *al-Aḥzāb*, 33:72.

2.4.1 DISAGREEMENT ON THE BASIS OF DIVERSITY

This has a number of aspects:

- (i) One of which is when each of two sayings or actions are legally correct as for example in the different readings of the Qur'an in which the Prophetic Companions disputed until the Messenger of Allah prevented them from disputing and said: "Both of you are correct."⁵⁴ The case is the same in the *adhān* and *iqāmah* and prayers starting supplications (*du'ā' al-istiftāḥ*) and the forms of *tashahhud*, and prayer in times of fear (*ṣalāt al-khawf*), and in funeral prayers (*ṣalāt al-janāzah*) and others.
- (ii) Another is when controversy is to do with the form but with agreement on the meaning as in the controversy which sometimes occurs in definitions and the names of objects and in dividing up the rulings into sections and others.

The ruling in this type of controversy is that each one is without doubt correct, and rebuking and detesting one of the two kinds or preventing it being followed and fighting to this end has only happened because of ignorance or oppression. Most of the disagreement which can be traced back to vain desires amongst the Islamic nation is of this type where it led to bloodshed and confiscation of property, enmity and hatred because one of the disputing parties did not recognise the right that the other party had and did not deal fairly with it but would add falsehood to the truth it

⁵⁴ See al-Bukhārī, *al-Jāmi' al-Ṣaḥīḥ*, no.2410 p. 189.

already had as did the other party. Hence, Allah identified its (i.e. disagreement) source as being envy saying:

He sent down the Book with truth to decide between people regarding their differences. Only those who were given it differed about it, after the Clear Signs had come to them, envying one another.⁵⁵

This is as an example to the Islamic nation.

2.4.2 DISAGREEMENT ON BASIS OF CONTRADICTION

Disagreement on the basis of contradiction concerns two sayings which are mutually exclusive either in the fundamentals like the disagreements between the different religions and sects as in when one group attributes to Allah what another group negates of Him or vice versa. It also concerns casting doubt upon the fundamentals of the religion and the areas of consensus like criticising the Qur'an or denying that the divine missions were ended by the Prophet Muhammad, or by legalising alcohol or usury or adornment and unveiling. Alternatively, it can be in the branches of the religion as when one group makes one thing mandatory and another forbids it like the drinking of *nabīdh* or marrying as a *muḥallil*.⁵⁶

Ibn Qutaybah narrated:

⁵⁵ *al-Baqarah*, 2:211.

⁵⁶ See Ibn Taymiyya, *Iqtīdā' al-ṣirāṭ al-Mustaqīm Mukhālafah Aṣḥāb al-Jahīm*, 1:126-135, ed Dr. Nāṣir al-'Aql, Saudi Arabia; 1st printing, 1984.

Al-Ma'mūn said to an apostate who had returned to Christianity: 'Tell me what it was that troubled you about our religion after having adopted it and left your old ways?' The apostate said: 'It was the amount of disagreement amongst you.' Al-Ma'mūn said: We have two types of disagreement, one of them is like the disagreement in the *adhān* (call to prayer) and the *takbīr* in the funeral prayer and *al-tashahhud*, and the feast day prayers, and the *takbīr al-tashrīq*, and certain recitations of the Qur'an. This is not disagreement but rather it is choice and breathing space and a lightening of the load. For he who calls the *adhān* twice and the *iqāmah* twice has not erred nor has he who calls the *adhān* twice and the *iqāmah* once and none reproach each other for doing so. The other type of disagreement, as in the disagreement in the interpretation of a verse from our holy book or interpretation of a *ḥadīth* while we agree upon the basis of revelation or the report. If it is this that has troubled you so that you have denied this book, then the interpretation of the entire Torah and Evangel should be agreed upon as its revelation has been agreed upon and there should not be amongst the Jews or Christians any disagreement about the interpretations, and you should then return to a language in which there is no disagreement as to the meanings of its expressions. And if Allah had so wished to reveal His books and make the speech of His Prophets and Messengers such that it did not require any interpretation He would have done so. However, we have not seen anything of religion or worldly life which has been given to us in its entirety and if it was thus then the trials and tribulations would end and competition and rivalry would cease. Allah has not built the world on this basis.' The apostate said: 'I bear witness that there is no God but Allah and that the Messiah is a slave of Allah and that Muḥammad is truthful and that you are truly the *amīr al-mu'minīn* [i.e. the Caliph].'⁵⁷

This story, leaving aside the extent of its veracity, depicts for us the question on a purely intellectual basis. It is what we previously alluded to by saying that disagreement is part of human nature although this does not mean that one who is astray can be excused because of it, but the intention is testing in order to distinguish between those who are sincere with Allah in seeking salvation and deliverance and

⁵⁷ See Ibn Qutaybah al-Dīnawarī, *Uyūn al-Akhbār*, Chapter: *al-'Ilm wa al-bayān wa al-radd 'alā al-mulḥidīn*, 2:154.

those who are not. If it is argued that some great Muslim scholars have stated:

“Difference is a mercy”, amongst whom Ibn Qudāmah who said:

Allah the Almighty by His mercy and His might, his power and His strength has ensured that a group from amongst this nation remain upon the truth and that none who abandon them can harm them until the command of Allah comes, and He made the reason for their survival the survival of their ‘*ulamā*’, and that they follow the guidance of their Imams and their *faqīhs*, and He made this nation with their ‘*ulamā*’ like the previous nations with their Prophets, and brought out in every class of their jurists Imams for them to follow and accept their opinions as the final word, and He made from the forebears of this nation famous Imams and through them He laid down the principles of Islam, and clarified the problematic areas of the law. Their agreement is a clear proof and their disagreement is a vast mercy.⁵⁸

Ibn Taymiyyah also said:

Controversy regarding the legal rulings may be a mercy if it does not lead to a the great evil of concealing the ruling. Hence, Ishāq b. Buhlūl al-Anbārī (d.252/866) composed a book which he named ‘*Kitāb al-ikhtilāf*’. Aḥmad [i.e. Ibn Ḥanbal] said: ‘Call it: ‘*Kitāb al-sa’ah*.’ It may be from the mercy of Allah to certain people that the ruling is concealed from them because of the difficulties that it may bring. This may be encompassed by Allah’s saying: “You who have *īmān*! do not ask about matters which, if they were made known to you, would make things difficult for you”^{59 60}.

I would say that the intention of those ‘*ulamā*’ was to point to one type of disagreement namely the first type which is disagreement on the basis of diversity, and not disagreement on the basis of contradiction. If it is argued that their speech is

⁵⁸ Ibn Qudāmah, introduction of *al-Mughnī*, 1:4. See also, Ibn Taymiyyah, *Majmu’ al-Fatāwā*, 30:80.

⁵⁹ *al-Mā’idah*, 5:101.

⁶⁰ Ibn Taymiyyah, *Majmu’ al-Fatāwā*, 14:159. See also, Ibn Mufliḥ Burhān al-Dīn Ibrāhīm b. Muḥammad (d.884), *al-Maqṣad al-arshad*, 1:248, ed. Dr. ‘Abd Al-Raḥmān al-‘Uthaymīn, Riyad; Maktaba al-Rushd, 1st Printing, 1990.

in general terms, so why limit it? I would say that one of the principles of reasoning is that when a general and a particular, or an absolute and a limited oppose each other, the general is brought to bear upon the particular, and the absolute upon the limited. Finally, it is not imaginable that any scholar from amongst the Muslim '*ulamā*' would intend to go against Allah and His messenger, because the '*ulamā*' are the heirs of the Prophets, and the transmitters of divine revelation, and the communicators in the name of Allah, and if one of them said something that was in conflict with the speech of Allah or His Messenger, then it being accepted would be dependant on it being in concord with the book of Allah and the *sunnah*, and if this was not the case, then rejection of this speech and acceptance of the speech of Allah and His Messenger would be incumbent upon the person religiously. Hence, these '*ulamā*' themselves allowed the rejection of issues in certain areas of controversy, and indeed allowed judges to rule the opposite even if a judge had previously given a ruling in favour of it. They also used to distinguish in certain issues between the *fāsid* (corrupt) and *bāṭil* (false) based on the nature of the controversy in the issue. The evidences for these issues are laid out in the appropriate places.

We are then able to draw a conclusion that confines controversy to that which is considered a comfort and a mercy for the Islamic nation. This being the type of disagreement in which, each of the two parties or disputants expends its efforts and energies in reference to the book of Allah and the *sunnah* of the Messenger of Allah with sincerity of intention and dedication in seeking out Allah's divine ruling,

without prejudice towards a certain Imam or school of thought, or group or nationality. The cause of this type of difference is the wideness of the meanings of the Book and the *sunnah* and the language of the Arabs, and the difference in the comprehension and understanding of the limits of the previous legal sources. This type of controversy contains mercy and comfort for the Islamic nation so that the judgement of Allah alone may be realised, and so that humanity may be obedient to the sacred and decreed law of Allah, and Allah knows best.

2.5 THE ETHICS OF DISAGREEMENT

It is clear from what has preceded that disagreement may be praiseworthy or it may be blameworthy. We also mentioned that what leads to blameworthy disagreement should be avoided, or that at the very least, an attempt should be made to avoid its consequential ill effects. Assisting in this is, the observance of the ethics of disagreement of which scholars have mentioned a number of points. However, before I mention them, I would like to point out that the cause and motive of the disagreement that arise between the Imams and the '*ulamā*' who acted according to the Qur'ān and the *sunnah*, and between the religious students who held fast to them (i.e. both Qur'ān and *sunnah*) is the endeavour to reach the truth, and the fear of making statements about Allah without knowledge. The dialectic that took place between them is as a form of studying and learning which compounded the faculty of memory and assist in assimilating knowledge and its delicate points and mysteries. If this was not the case, then the '*ulamā*' would totally censure and show aversion to it.

Scholars made clear the extent of its harmful effects for its proponent and the others.

Among its harmful effects is:

(i) The dislike and antipathy that may come between the disputing parties, and the mutual opposition which may occur, which has been prohibited in the *ḥadīth*:

Beware of suspicion, for suspicion is the of false tales, and do not look for the others' faults and do not spy, and do not be jealous of one another, and do not turn your backs on one another (i.e. do not cut your relation with one another), and do not hate one another, and O slaves of Allah! be brothers.⁶¹

(ii) This might also lead to the triumph of falsehood and the rejection of the truth, which is one of the most grievous of ills.

Ibn al-Najjār al-Ḥanbalī quoted that

Ibn Hubayrah al-Ḥanbalī said: The dialectic which occurs between the leaders of the juridical schools is the most fitting of its type because it stems from repetition and study. As for the consensus of those who vie with each other regarding an issue, where none of them would care to retract from his position if anger arose, and where there is no civility or mutual liking or preparation of the hearts to receive truth, yet it is in opposition to this is been censured by the '*ulamā*' and considered heresy. This is in accordance with the *ḥadīth*: "A people will only go astray after having had guidance if they come to arguing, then he recited 'They only say this to you for argument's sake.'⁶²." ⁶³ Ibn 'Aqīl in his *al-Wāḍiḥ* said: "Every argument whose aim is not the triumph of the truth is as a plague upon its proponent and its harm outweighs its benefit because controversy causes mutual estrangement, and if it were not for the

⁶¹ *ṣaḥīḥ*. It was related by al-Bukhārī, 5143 p. 445; and Muslim, 2563 p. 1127 from Abū Hurayrah.

⁶² *al-Zukhruf*, 43:58.

⁶³ *ḥasan*. It was related by Aḥmad, 5:252,256; al-Tirmidhī, 3253 p. 1984; Ibn Mājah, 48 p. 2480; al-Ḥākim Muḥammad b. 'Abd Allah, *al-Mustadrak*, 2:448. All from Ḥajjāj b. Dīnār, from Abū Ghālib, from Abū 'Umāmah. al-Tirmidhī said: It is *ḥāsan ṣaḥīḥ*. al-Ḥākim said: It is *ṣaḥīḥ*. This is due to the difference of opinions about Abū Ghālib. See Ibn Ḥajar, *Tahdhīb al-Tahdhīb*, 4:570 and *al-Taqrīb* p. 1188.

necessity of forbidding what is wrong and rescuing the person doomed by striving to retrieve him from his error, then argument would not be a good thing because of the dissension it usually causes. It does have the greatest of benefits when the triumph of the truth and intensifying oneself for *ijtihād* is its intention, and we seek refuge in Allah from the intention of overpowering others or showing proficient for these should be avoided.' Because of this Allah said: 'If they do argue with you, say: Allah knows best what you are doing.' Ibn al-Jawzī said: 'This is a fine ethic which Allah has taught His servants so that they may refute those who may seek to stubbornly argue with them and not answering them.' So if the ill intention of the disputant is obvious then to argue with him becomes forbidden.⁶⁴

Ibn al-Najjār and other scholars who have compiled books on the principles of dialectic and debate have mentioned a number of etiquette which should be observed.

Amongst them being that attention should be paid to the choice of words and expressions so that they are courteous and not impolite, and that one should pay heed to and listen carefully to one's opponent and consider his speech carefully. One should not shout or raise one's voice to one's opponent, nor should one annoy or anger him or seek to belittle him or use obscure modes of speech. If one's opponent makes a mistake in his expression while the meaning is clear then one should not concern oneself with the expression if the intention is in the meaning and not the expression.⁶⁵ There are other etiquette also which if contemplated by the student and

compared to what occurs between debaters either in some academic written refutations or in contemporary news media, he would understand fully the people's

⁶⁴ Ibn al-Najjār Muḥammad b. Aḥmad al-Fatūhī al-Ḥanbalī (d.972/1564), *Sharḥ al-Kawkab al-munīr*, 3:366-371, , ed. Dr. Muḥammad al-Zuhaylī and Dr. Nazīh Ḥammād, Makkah; Umm al-Qurā University, 1982.

⁶⁵ For more details, see Ibn al-Najjār, *Sharḥ al-Kawkab al-munīr*, 4:391-392.

dire need to discover Islam which is so neglected from the reality of life and the daily practices of the people.

2.6 NUMBER OF CONTROVERSIAL ISSUES:

It is impossible to produce a precise figure for the total number of all *fiqh* issues, let alone the number of the controversial issues. However, some scholars have reported rough figures for these controversial issues. Ibn Taymiyyah states that:

The most fundamental issues agreed upon by all scholars are only 400 in number. These are contained in the major books of *fiqh*, also in books on controversial issues written by the scholars from various schools of jurisprudence from Khurāsān and Iraq. However, the number of the controversial issues according to the scholars who have encompassed them like al-Qāḍī Abū Ya'lā runs into several thousands (*ulūfun mu'allafah*), maybe four thousands, perhaps more and perhaps less. If we were to restrict ourselves to the top major ones, then their number would be in the region of 100 issues or so.⁶⁶

What could be concluded from the foregoing quotation is that the number of controversial issues is relatively big, running into several thousands. An even higher figure was reported by other scholars, namely by some Ḥanbalī scholars who asserted that Imam Aḥmad alone had ten thousand issues specific to him which the

⁶⁶ *Al-Istiḳāmah*, ed. Muḥammad rashād Sālim, 1:62-63, 1st. edition, Imam Muḥammad b. Su'ūd University 1983.

rest of the four Imams did not have.⁶⁷ Such a figure, although it seems somewhat exaggerated and in need of verification to ascertain its correctness, nevertheless points to the sizeable corpus of controversial issues.

This huge number of controversial issues might lead some to believe that Islamic jurisprudence is a 'controversial jurisprudence', where there can hardly be an issue agreed upon among the Sunni Muslims. Some could actually go even further, denying *ijmā'* as one of the sources of legislation in Islam, as for them it does not exist. Such a position, in my view, is an extreme position brought about mostly by a lack of adequate knowledge of what is in the books of *fiqh*.

The issues of *fiqh* are in no way all controversial. In fact many scholars are of the view that the non-controversial *fiqh* issues are larger in number than the controversial ones. Ibn Taymiyyah himself subscribes to this view. He asserts that:

The majority of *fiqh* issues needed by the people and used in *fatāwā* are well established and supported by textual provisions from the Qur'ān and the *sunnah* or by *ijmā'*. Controversy and disputes arise around issues seldom needed by the people. Most of these controversial issues relate to matters which are both limited and rare in their occurrence. As for issues which are absolutely necessary for the people to know, regarding matters that are *wājib* (compulsory), *ḥarām* (prohibitions), and *mubāḥ* (allowable) matters, these are well known and agreed upon...⁶⁸

⁶⁷ See Muḥammad b. al-Manqūr (d.1125/1713), *al-Fawākih al-'adīdah fī al-masā'il al-mufīdah*, 1:52, also Abū Zayd, B. *al-Madkhal al-Mufaṣṣal*, 2:908.

⁶⁸ See Ibn Taymiyyah, *Majmū' al-Fatāwā*, 13:118.

The following is a list of other books on controversial issues to give us an estimate of the relative size of controversial and non-controversial issues:

1. *al- Ishrāf 'alā madhāhib ahl al- 'ilm* by Ibn al-Mundhir (d.318/930). As already mentioned above, this book was one of the sources of Abū Ya'lā in his book the *Ta'līq*. *Al- Ishrāf* includes 2030 issues only.

2. *al-Ishrāf 'alā nukat masā'il al-khilāf* by al-Qāḍī 'Abd al-Wahhāb al-Mālikī (d.422/1031) which includes 2123 issues only.

3. *Mukhtaṣar Khilāf al- 'ulamā'* by Abū Bakr al-Jaṣāṣ which includes 2322 issues.

4. *al-Ta'līq al-kabīr* by al-Qāḍī Abū Ya'lā (d.457/1065). Only the equivalent of 9% of the original book is currently available. The available section includes around 330 issues. The total number of issues of the whole book would, therefore probably amount to less than 4000 issues and possibly less than 3500 issues.

If, however, the total number of *fiqh* issues, controversial and non-controversial alike, is considered, we find for example that the *Mukhtaṣar* of al-Khiraqī (d.334/946), which was one of the oldest textbooks in Ḥanbalī jurisprudence, and was also explained by Ibn Qudāmah al-Maqdisī in his book *al-Mughnī*, contains

2028 issues.⁶⁹ This figure represents the majority of the *fiqh* issues both controversial and non-controversial. It does not, however, include the secondary issues reported by the commentator, Ibn Qudāmah. The latter reported in his book under the heading '*faṣl*' (section) a large number of issues, multiplying the number mentioned above four or five fold.

The *Muḥallā* by Ibn Ḥazm al-Ẓāhirī can be quoted as another example of a book including controversial and non-controversial issues. It contains 2307 issues in total.⁷⁰

Some other scholars have tried to bring together all the non-controversial issues in one volume. One such scholar was Ibn al-Mundhir Muḥammad b. Ibrāhīm (d.318/930) who wrote his book *al-Ijmā'*⁷¹ which contains 836 issues. He also pointed out that, in his other books: *al-Ishrāf* and *al-Awṣaṭ*, he reported other non-controversial issues which he did not mention in his book *al-Ijmā'*.

⁶⁹ This is according to the numbering of the book's editor Dr. 'Abd Allah b. 'Abd al-Muḥsin al-Turkī, Cairo. This number is for the issues reported by al-Khiraqī. Ibn Qudāmah added to them other issues in his commentary.

⁷⁰ This is according to the numbering of the book's editor Aḥmad Shākir.

⁷¹ This was printed in the UAE, edited by Dr. Saghīr Aḥmad.

Ibn al-Mundhir is of the view that the agreement of the majority of scholars over a certain issue should be considered as valid *ijmā'*, even if one or two scholars stand apart. The same view is also subscribed to by Ibn Jarīr al-Ṭabarī.⁷²

More recently, a contemporary researcher put together a book on *ijmā'* where he collated all the issues identified by scholars of various schools of jurisprudence as non-controversial. He classified and listed these issues alphabetically. In total, he listed 9588 issues.⁷³

2.7 THE SCIENCE OF VALIDATING AND INVALIDATING NARRATORS

(JARḤ & TA'DĪL)

Linguistically, the term *jarḥ* (wounding, injuring), can be used literally with reference to physical entities as well as metaphorically with reference to abstract notions and attributes. In *ḥadīth* terminology, it is used to mean: 'describing the narrator of a *ḥadīth* using an attribute which would lead to rejecting his transmission, either by invalidating his justness and uprightness (due to deviation or innovation in religion) or his memory (due to error or poor memory) or both of them.'⁷⁴

⁷² See Ibn Ḥazm, *al-Iḥkām fī uṣūl al-aḥkām*, 4:507.

⁷³ See Sa'dī Abū Ḥabīb, *Mawsū'at al-ijmā' al-Islāmī*, Damascus, 1996.

⁷⁴ Ibn al-Athīr, *Jāmi' al-uṣūl*, 1:121.

Ta'dīl, on the other hand, is the opposite of *jarḥ* and is used to mean: 'praising the narrator on account of his uprightness and the strength of his memory.'

Since the time of the Companions, Muslims have paid special attention to the narrators and to ascertaining the strength of their transmissions⁷⁵, in accordance with the Qur'ānic injunction:

You who have 'īmān! If a deviator brings you a report, scrutinize it carefully in case you attack people in ignorance and so come to greatly regret what you have done⁷⁶.

Thus, *isnād* (establishing the chain of transmission) has been regarded as "part of one's religion" (*al-isnādu mina-ddīn*) and scholars have been advising their students to carefully select their *shaykhs* (teachers). They would tell them:

Verily, this matter [i.e. listening to narrations and transmitting them] is an integral part of your religion, so mind who you take your religion from.⁷⁷

Verifying a transmission was quite easy at the time of the Companions and their Successors, given the proximity of both generations to the era of prophethood and the relative shortness of the chains of transmission. However, as time went by, chains of transmission grew longer and the narrators increased in number and became scattered in the various Islamic regions, and the scholars felt the need to

⁷⁵ See for example al-Tirmidhī, *al-Sunan*, *hadīth* No. 2101, p. 121.

⁷⁶ The Holy Qur'ān, *Al-Ḥujurāt*, 49:6.

compile these chains of transmission in specialized books. Consequently, the Islamic library, nowadays, abounds with books compiled in this discipline by eminent figures like al-Dhahabī who authored his well known book *Mẓān al-i'tidāl fī naqd al-rijāl*. In this book, al-Dhahabī classifies narrators into various ranks in terms of whether their transmission should be accepted or rejected. He uses specific terms to designate the rank of each narrator, thus passing a verdict on whether his transmission is to be accepted or turned down.

One point worth noting in this respect is that the terminology used by the scholars is not uniform across the board. Indeed, some scholars have their own terminology. It is, therefore, very important that the terminology of each scholar is studied in its own right. This becomes all the more imperative when scholars of *ḥadīth* differ in their verdicts about a specific transmitter. The following is a review of the terms used in the field of validating and invalidating transmitters as well as the ranks of these transmitters according to al-Dhahabī in the introduction to his book *Mẓān al-i'tidāl*. A great number of these terms are used in the treatise at hand, *Tanqīh al-Taḥqīq*.

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⁷⁷ Muslim, *Muqaddimat Ṣaḥīḥ Muslim*, 1:84.

**The levels of *jarḥ* (invalidity) according to al-Dhahabī in his book '*Mizān al-
i'tidāl*'.**

Level	Expression Used
The Weakest Level	<i>Dajjāl, kadhdhāb, waḍḍā'</i> , fabricator of <i>ḥadīths</i>
2	<i>Muttaḥamun bi-l-kadhib</i> (accused of lying), <i>muttafaqun 'alā tarkih</i> (consensus exists that he is to be rejected)
3	<i>Matrūk</i> (deserted), <i>laysa bi thiqaḥ</i> (not reliable), <i>ḍa'ifun jiddan</i> (extremely weak), <i>dhāhib al-ḥadīth, fīhi naẓar, hālik, sāqiṭ</i>
4	<i>Wāhī, laysa bi shay', ḍa'if wāhī, munkar al-ḥadīth</i>
5	Considered weak, has a weakness, <i>laysa bi -l-qawī</i> (not strong), <i>laysa bi ḥujjah</i> (cannot be used as evidence), <i>layyin, sayyi' al-ḥifẓ</i> (of poor memory), <i>mukhtalafun fīh</i> (opinions differ about him), <i>ṣadūq lākin nahu mubtadi'</i> (truthful but an innovator), truthful but cannot be used as evidence)

The levels of *ta'dīl* (authenticity) according to al-Dhahabī in his book *Mizān al-i'tidāl*

The Highest Level	<i>Thabtun ḥujjah, thabtun ḥāfiẓ, thiqatun mutqin, thiqatun thiqah</i>
2	<i>Thiqah.</i>
3	<i>Ṣadūq, lā ba'sa bihi, laysa bihi ba's</i>
4	<i>Maḥalluhu al-ṣidq, jayyid al-ḥadīth, ṣāliḥ al-ḥadīth, shaykhun wasaṭ, shaykhun ḥasan al-ḥadīth, ṣadūq in shā' Allāh, ṣuwayliḥ</i>

2.8 THE IMPORTANCE OF REFERRING *ḤADĪTHS* TO A MULTIPLICITY OF SOURCES

The establishment of a chain of transmission of *aḥādīth* and ascribing it to a number of different sources can have a number of advantages:

1. The multiplicity of narrations increases the strength of *aḥādīth*. The more narrations available to a scholar of *ḥadīth*, the more confident he becomes about the authenticity of the *ḥadīth*. For this reason, the scholars of *ḥadīth* took special interest in collecting all the narrations of a single *ḥadīth*. For example, Al-Ṭabarānī Sulaymān b. Aḥmad (d.360/970) collected all the narrations of the *ḥadīth*:

Whoever falsely ascribes something to me, then let him occupy his place in Hellfire.⁷⁸

He was able to count 176 narrations, from 60 of the Companions.⁷⁹ The scholars were therefore able to assert authoritatively that this *ḥadīth* was concurrently *mutawātir* (recurrent.)

⁷⁸ It is printed.

⁷⁹ It was related by Mālik, *al-Muwaṭṭa'*, p.110, translated by Aishah Bewley; al-Bukhārī, *al-Jāmi'* *al-ṣaḥīḥ*, 1503; Muslim, 984; al-Tirmidhī 675, al-Nasā'ī, 2501. See also, Ibn Ḥajar, *Fatḥ al-Bārī sharḥ Ṣaḥīḥ al-Bukhārī*, 1:203-204.

2. It enables one to get at all the rules (*ahkām*) embodied in the *ḥadīth* as not all the narrators are of the same degree of memorization. Some narrators might even narrate the *ḥadīth* by giving its meaning only. Yet some other narrators might narrate the *ḥadīth* in an abridged form and (unlike narrators) fail to narrate it in its full form. Abridgement can be the result of poor memory or of a deliberate decision to give the point in case to suit a particular argument or to suit a particular situation.

The following example will serve to illustrate how more than one-narration helps in working out the rules embodied in a *ḥadīth*.

Ibn 'Umar said: "The Messenger of Allah made the *zakāt* of breaking the fast at the end of *Ramaḍān* obligatory on every Muslim, whether freeman or slave, male or female, and stipulated it to be a *ṣā'* of dates or a *ṣā'* of barley."⁸⁰

al-Tirmidhī said:

The *ḥadīth* of Ibn 'Umar is *ḥasanun ṣaḥīḥ* (i.e. a good and authentic *ḥadīth*). Mālik narrated from Nāfi' from Ibn 'Umar from the Prophet a similar version to Ayyūb's, with the addition '*min-al-muslimīn*' (i.e. from among the Muslims.) This addition led to a controversy around a man who has non Muslim slaves, whether he should pay the end of *Ramaḍān zakāt* for them or not. According to Mālik, al-Shāfi'ī and Aḥmad [i.e. who take the *ḥadīth* with its addition] he should not, but he should, according to al-Thawrī, Ibn al-Mubārak and Ishāq.⁸¹

Two conclusions can be reached from the foregoing quotation by al-Tirmidhī:

⁸⁰ See Mālik b. Anas, *al-Muwatta'*, p.110, translated by 'Aishah Bewley. The *ḥadīth* is related also by al-Bukhārī, *al-Jāmi' al-ṣaḥīḥ*, 1503; Muslim, 984; al-Tirmidhī 676, al-Nasā'ī, 2501.

⁸¹ See: al-Tirmidhī no. 676 p. 1713.

(i.) Imam Mālik was the only one to narrate the above *ḥadīth* with the addition '*min-al-muslimīn*' (from among the Muslims), and that a number of other narrators have not included that addition.

(ii.) The *ḥadīth* without the addition embodies a certain rule (*ḥukm*) which is different from the rule when the *ḥadīth* is taken with the addition, and thus we find the controversy among the scholars over a man who is responsible for the sustenance of individuals who are non-Muslims, whether he should pay the end of *Ramaḍān zakāt* for them or not.

However, if we scrutinize the various transmissions of the *ḥadīth*, we find that Mālik was not the only one to narrate the *ḥadīth* with the addition and that he was followed by 'Ubayd Allah b. 'Umar al-'Umārī⁸², his brother 'Abd Allah b. 'Umar al-'Umārī⁸³, 'Umar b. Nāfi'⁸⁴ and by al-Ḍaḥḥāk b. 'Uthmān (trustworthy).⁸⁵ Although Mālik was an eminent scholar and a firm authority in *ḥadīth*, and many were led as a result to accept the addition in his narration of this *ḥadīth*, it is also true to say that the fact that other trustworthy narrators followed him in narrating the addition increases the

⁸² He is a trustworthy narrator and his *ḥadīth* was related by Mālik, *al-Muwaṭṭa'*, p.110, translated by 'Aishah Bewley.

⁸³ He is a weak narrator and his *ḥadīth* was related by Aḥmad, no. 5317.

⁸⁴ He is a trustworthy narrator and his *ḥadīth* was related by Aḥmad, no.5906

reliability of his narration and excludes any possibility of error in it. It is also important to add that there were narrations from both Mālik and 'Ubayd Allah both with and without the addition. This is because of differences between the narrators who narrated from them. For example, Qutaybah b. Sa'īd narrated the same *ḥadīth* from Mālik without the addition.⁸⁶

The role of a jurist (*faqīh*) is limited to deriving the legal rule from the evidence and in so doing he usually concerns himself only with the point in case for his argument. As a result, many jurists do not check whether the *ḥadīth* is authentic or weak while quoting the evidence in support of the opinion opted for by the scholars of their own school of jurisprudence. Whereas a scholar of *ḥadīth* (*muḥaddith*) scrutinizes the different narrations of a *ḥadīth*, compares its chains of transmission and its texts in order to reach a suitable verdict on the *ḥadīth*. It is this fundamental concern of a *muḥaddith* which led Ibn al-Jawzī to write his book *al-Taḥqīq* and led many scholars from various schools of jurisprudence to establish the chains of transmission of the *ḥadīths* of their respective schools. Examples of these scholars include al-Zayla'ī 'Abd Allah b. Yūsuf (d.762/1360) of the Ḥanafī school in his book *Naṣb al-*

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⁸⁵ He is a trustworthy narrator and his *ḥadīth* was related by al-Bukhārī no. 1503.

rāyah fī takhrīj aḥādīth al-Hidāyah (i.e. *Hidāyat al-muhtadī* of al-Marghīnānī (d. 593/1196), al-Ghumārī (d.1380/1960) from the Mālikī school in his book *al-Hidāyah fī takhrīj aḥādīth al-Bidāyah* (i.e. *Bidāyat al-mujtahid* by Ibn Rushd (d. 595/1198), al-‘Asqalānī Ibn Ḥajar al-Shāfī (d. 852/1448) in his book *al-Talkhīṣ al-ḥabīr*, and others.

3. Another advantage of collecting the different narrations of a *ḥadīth* and scrutinizing its various chains of transmission is to know the narrators and establish their degree of memorization, verification and perfection. It is a well known fact that if a given narrator is most often in disagreement with other trustworthy narrators, then that undermines his position and serves him the verdict of *ḍa‘īf* (weak).⁸⁷

4. Collecting the different narrations can also be valuable in knowing the personalities of the transmitters and their circumstances. This is important because certain narrators are mentioned by name or by nickname only, which might get them mixed up with other narrators. When both narrators are trustworthy, then there is not much of a problem, as in the case of Sufyān, who could be either al-Thawrī or Ibn

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⁸⁶ See Muslim, no. 984.

⁸⁷ For more details see: Azami M.M, *Studies in Ḥadīth Methodology*, p. 51-53.



‘Uyaynah, or Ḥammād, who could be either Ibn Zayd or Ibn Salamah. All of these are trustworthy, and so mixing two of them up has no negative implications for the authenticity of a *ḥadīth*. However, if one of them is weak, then the authenticity of the *ḥadīth* is definitely undermined. So if, in a different narration, this particular narrator is mentioned giving his name, his father’s name, and his grandfather’s name, then the problem is solved and the verdict concerning the *ḥadīth* becomes clear. Sometimes, some narrators are mentioned and extra information is given about their characters and abilities, for example, in this way: “So and so reported to me.. and he was a memorizer, or trustworthy, or diligent in worship etc..”⁸⁸. This extra information is of great value.

In fact, knowing the narrators has always attracted a great deal of interest from scholars of *ḥadīth*. They devoted a special discipline to it known as *al-muttafiq wa al-muftariq* (i.e. The Concordant and the Discordant.) By this they mean the narrators who have the same name, father’s name and maybe more in common but are different in person, like ‘Abd Allah b. Dīnār, the student of Ibn ‘Umar, a trustworthy narrator from Madīnah, and ‘Abd Allah b. Dīnār, one of the weak

⁸⁸ See some examples from Imam Mālik and Shāfi‘ī quoted by al-Suyūṭī Jalāl al-Dīn ‘Abd al-Raḥmān (d.911/1505) in his *Tadrīb al-rāwī*, 1:366-368.

narrators from Ḥimṣ (Syria) who used to narrate from Nāfi'.⁸⁹ Another example is Muḥammad Ibn Jarīr al-Ṭabarī, the author of the exegesis of the Holy Qur'ān and one of the eminent Sunni scholars and Muḥammad Ibn Jarīr al-Ṭabarī, a Shiite scholar. Both men had the *kunya* of Abū Ja'far.⁹⁰ The scholars have even written separate books on this discipline and paid special attention to which teachers had with students as a means of determining the identity of a particular narrator. For example, when Imam Aḥmad narrates from Ibn al-Qāsim, it is not Ibn al-Qāsim, the student of Imām Mālik, that is meant, but Hāshim Ibn Al-Qāsim, one of the teachers of Imam Aḥmad, because Imam Aḥmad never narrated from the student of Imam Mālik. Likewise, when Imam Aḥmad narrates from Sufyān, then it is Sufyān b. 'Uyaynah and not Sufyān al-Thawrī, because Imām Aḥmad never heard from Sufyān al-Thawrī. This is despite the fact that Sufyān b. 'Uyaynah and Sufyān al-Thawrī had many teachers and students in common.⁹¹ More examples can be cited in this respect; however, the point is to highlight the importance of knowing the various ways of transmission of *ḥadīth*.⁹²

⁸⁹ See al-Nasā'ī *ḥadīth* no. 2502. Also, al-Suyūṭī, *Tadrīb al-Rāwī*, 2:820-836.

⁹⁰ See Ibn Ḥajar, *Tahdhīb al-Tahdhīb*, 2:328.

⁹¹ See what was reported by al-Dhahabī on how to distinguish between various transmitters, *Siyar al-'lām al-nubalā'*: 7:464-466.

⁹² See al-Dhahabī, *Mẓān al-i'tidāl*, 4:418-419.

5. Studying the various narrations of a *ḥadīth* further helps to pinpoint any blemish (*'illah*) affecting a certain *ḥadīth*, like *inqiṭā'* (disconnection), *tadlīs* (concealing a *ḥadīth*'s defects), *irsāl* (incomplete transmission) or other errors. 'Alī b. al-Madīnī, an authority in the field of *'illah* once said: "If the various narrations of a particular *ḥadīth*, are not studied side by side, it is not possible to pinpoint any errors in it."⁹³

An obvious example to illustrate this point would be *ḥadīth* No. 157 in this study.

In conclusion, it could be argued that reporting the different sources of establishing the chain of transmission of the *ḥadīth* is not a matter of mere padding of the text with redundant information. Rather, the scholars of *ḥadīth* do that to document the text and edit it. This discipline, in fact, is clear evidence to refute the allegations of those who claim that the *ḥadīths* of *aḥkām* (embodying legal rules) are all fabricated by the jurists.⁹⁴ As for the fact that *takhrīj* is sometimes extensive and at other times more concise, this depends on the nature of the research and the results the researcher aims to achieve.

⁹³ See: al--Suyūṭī, *Tadrīb al-rāwī*, 1:296.

⁹⁴ See: Shacht, *The Origins of Mohammadan Juisprudence*, p.163-64. Also, *Introduction to Islamic Law*, p.35-36.

CHAPTER 3: IMAM AḤMAD'S SCHOOL OF JURISPRUDENCE

3.1 THE DEVELOPMENTAL STAGES OF THE SCHOOL

Like other schools of Islamic jurisprudence, Imam Aḥmad's own school went through a number of stages. These are as follows:

A. The Formation Stage (?-241/855)

This stage covers the duration of Imam Aḥmad's lifetime (164/780-241/855), starting with his quest of knowledge and including the recording of most of his sayings and opinions during his lifetime. Imam Aḥmad received his knowledge from more than 280 scholars¹, prominent among whom was Imam al-Shāfi'ī (d204/819). al-Shāfi'ī equally received some of his knowledge from Aḥmad and this perhaps explains the many resemblances the two schools of jurisprudence bear to each other. These similarities pertain to so many issues that some *fiqh* scholars went as far as claiming that there should be no need for the Ḥanbalī school of jurisprudence, as it only differs from the Shāfi'ī school in perhaps 16 *fiqh* issues. However, such an opinion can hardly stand any degree of scrutiny and, therefore, found little acceptance amongst the Ḥanbalī scholars who authored a number of

¹ al-Dhahabī, *Siyar a'lām al-nubalā'*, 1:181.

books highlighting the “*mufradāt*”, or the *fqh* issues with opinions exclusively held by Imam Aḥmad (and not found in other *madhāhib*).² Some Ḥanbalī scholars estimate these issues to be in excess of 10.000 issues.³

At the beginning, Imam Aḥmad disliked recording his *fiqh* opinions. Questioned about this matter he replied: “ I do not like it. Whenever a man comes along, he authors a book of his own, leaving aside the recording of the traditions of the Messenger of Allah.”⁴ It is clear from the quotation above that Imam Aḥmad's purport was to urge the scholars to collect the traditions of the Prophet, record them, study them and teach them, thus, contributing towards bridging the gap between the various viewpoints and minimizing the controversy between the different schools of jurisprudence. Imam Aḥmad himself invested vigorous efforts in recording the Prophet's traditions and urged his students to record them. The result of such endeavours was that he was able to compile the largest *ḥadīth* encyclopedia entitled “*The Musnad*”, which includes about 30,000 prophetic traditions.

‘Abd Allah, the son of Imam Aḥmad said: I said to my father: “Why did you compile the *Musnad* while you disapprove of writing books?” He replied: I intended this book

² Bakr Abū Zayd, *al-Madkhal al-mufaṣṣal*, 2:908-912.

³ al-Manqūr, (d1125/1713), *al-Fawākih al-‘adīdah fī al-masā’il al-mufīdah*, 1:52.

to be an Imam (i.e. a point of reference) for all people. When people disagree about the *sunnah* of the Prophet, they can refer back to it.”⁵ It seems also that, having sensed a favourable response on the part of other scholars and on the part of his own students to his call to collect the *ḥadīth* of the Prophet, Imam Aḥmad started writing his own books. He wrote more than 30 books, a few of which have been printed such as: *Faḍā'il al-ṣaḥābah*, *al-Zuhd*, *al-Wara'*, *al-Radd 'alā al-zanādiqah wa al-jahmiyyah*, *al-Ashribah* etc. This is in addition to the books of “*masā'il*” compiled by his students in which they included his answers to questions put to him in various Islamic disciplines.⁶

An allegation has been leveled against Imam Aḥmad and it is opportune at this point of discussion to mention it along with the arguments to refute it. The allegation is that “Imam Aḥmad was a *muḥaddith* (a scholar of *ḥadīth*) but not a *faqīh* (a scholar of jurisprudence).” Such an allegation is based on the fact that a number of scholars who wrote books on the subject of “the science of controversy” have not mentioned Imam Aḥmad and only mentioned the other three Imams. The first to feature such

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⁴ Ibn Ḥanbal, ‘Abd Allāh, *Masā'il Aḥmad*, issue no. 1821.

⁵ Abū Mūsā al-Madīnī al-Ḥāfiẓ, (d.581/1185), *Khaṣā'iṣ al-Musnad*, p.5.

⁶ Abū Zayd, *Al-Madkhal al-Mufaṣṣal*, 1:351-355.

omission was Ibn Jarīr al-Ṭabarī (d.310/922) in his book *Ikhtilāf al-fuqahā'*, followed by al-Ṭaḥāwī Abū Ja'far al-Ḥanafī (d.321/933), Ibn 'Abd al-Barr al-Mālikī (d.463/1070) and Abū Ḥāmid al-Ghazālī al-Shāfi'ī (d.505/1111). The following arguments can be put forward in answer to this allegation:

The Ḥanbalī school of jurisprudence is one of the major four *madhhabs* unanimously recognized by the *Ummah* as such. It has its scholars, who are well renowned for their knowledge and their expertise in *fiqh*. Their books in *fiqh* and *uṣūl al-fiqh* (principles of jurisprudence) are well known and widely used. This school of jurisprudence also has its disciples and followers.

Imam Aḥmad's eminent status in *fiqh* is testified by a number of his contemporaries (also eminent scholars) like al-Shāfi'ī who was also one of his teachers), 'Abd al-Razzāq al-San'ānī, Abū Thawr, Ibn Ma'īn etc.⁷

The fact that some scholars omitted Imam Aḥmad's views from their books is counter-balanced by the fact that other scholars have included them, such as al-Tirmidhī, in his book *al-Sunan*, Abū Dāwūd also in his book *al-Sunan*, Muḥammad

⁷ Al-Dhahabī, *Siyar a'lām al-nubalā'*, 11: 195,196,203,205,291,293.

b. Naṣr al-Marwazī (d.294/906) in his book *Ikhtilāf al-fuqahā*⁸ and other jurists and scholars of *ḥadīth* from various schools of jurisprudence.

It should be noted, here, that it is not befitting to dispraise those who have omitted Imam Aḥmad from their books nor is it Islamically permissible to undermine them, as did some of the Ḥanbalī scholars with Ibn Jarīr al-Ṭabarī;⁹ as this amounts to reprehensible fanaticism.¹⁰

B. The Collection and Recording Stage (241-403/855-1012)

This phase started during Imam Aḥmad's lifetime when his students began to record the corpus of his *fiqh* opinions. However, the first to do this systematically was al-Khallāl Aḥmad b. Muḥammad b. Hārūn (d.311/923) in his book *Jāmi' al-Riwāyāt 'an Aḥmad*, followed by his student Abū Bakr 'Abd al-'Azīz, alias "*Ghulām al-Khallāl*" (d.363/973). Subsequently, al-Khiraqī Abū al-Qāsim 'Umar b. al-Ḥusayn (d.334/945) wrote his book *al-Mukhta-sar fī al-fiqh al-Ḥanbalī* with its *sharḥ*

⁸ This book was edited by Muḥammad Ṭāhir Ḥakīm and printed in Riyadh, 2000. The author's methodology is as follows: He starts with the sayings of the Imams: Mālik, al-Shāfi'ī, Aḥmad, al-Layth b. Sa'd and Abū Thawr. As for the Ḥanafīs, he calls them "*aṣḥāb al-ra'y*" (People of personal interpretative judgements) or "*al-Kūfiyyūn*". The book comprises more than 360 issues.

⁹ Ibn Kathīr, *al-Bidāyah wa al-nihāyah*, 14:848-849.

¹⁰ Abū Zahrah, M. *Tārīkh al-madhāhib al-Islāmiyyah*, 2:323-324, Dār al-Fikr al-'Arabī; also, Bakr Abū Zayd, *al-Madkhal al-mufaṣṣal*, 1:356 ff.

(explanation). Not long after, al-Ḥusayn b. Ḥāmid (d.403/1012) wrote his book, *Jāmi' al-madhhab*. He also wrote other books on the principles of Aḥmad's school of jurisprudence.¹¹

C. The Edition and Revision Stage (403-884/1012-149)

This stage started with al-Qāḍī Abū Ya'lā Muḥammad b. al-Ḥusayn al-Farrā' (d.458/1065) and finished with Ibn Mufliḥ Ibrāhīm b. Muḥammad (d.884/1479) who was the most eminent Ḥanbalī scholar of his time. The most renowned of his books was *al-Mubdi' sharḥ al-Muqni'*, which is considered an encyclopedia of Ḥanbalī *fiqh*. It has been printed in 9 volumes.

D. The Status-quo Stage (885-1350/1013-1931)

This stage was limited to the study of the inherited corpus of Ḥanbalī *fiqh*, with no new additions.

This stage led into the present day (fifth) stage, which is:

E. The Revival of the Ḥanbalī Heritage (1350/1931- to date)

This stage is marked by an earnest effort to revive the Ḥanbalī heritage by many researchers and postgraduate students in Saudi Arabia, where the Ḥanbalī *madhhab*

¹¹ Abū Zayd *al-Madkhal al-mufaṣṣal*, 1:135,456-459.

has been officially adopted by the Government and followed by its scholars. This scholastic endeavour consists of editing, studying and printing a considerable number of Ḥanbalī books. The number of printed books so far is estimated to be more than 250 books in Islamic creed, Qur'ānic sciences, *ḥadīth*, jurisprudence, principles of jurisprudence etc.¹²

3.2 THE PRINCIPLES OF IMAM AḤMAD'S SCHOOL

The first scholar to author a book in the principles of the Ḥanbalī *madhhab* was al-Ḥasan b. Ḥāmid (d.403/1012). He was the teacher of al-Qāḍī Abū Ya'lā. Subsequently, al-Qāḍī Abū Ya'lā wrote several books on the principles of jurisprudence such as "*al-'Uddah*", which has been printed and is discussed below. Imam Aḥmad based his *madhhab* on five principles. These are, in brief, as follows:¹³

1. A Text (*naṣṣ*): this could be from the Qur'ān or the authentic *sunnah*, and its signification could be either definitive or speculative¹⁴. Once Imām Aḥmad establishes a certain *ḥadīth* as authentic, he relies on it even if it contradicts the

¹² Abū Zayd, *al-Madkhal al-mufaṣṣal*, 1:136.

¹³ For more details regarding Imām Aḥmad's school principles see Ibn al-Qayyim, *I'lām al-muwaqqi'īn*, 1:28-32; Ibn Badrān, *al-Madkhal*, p. 49; Bakr Abū Zayd, *al-Madkhal al-mufaṣṣal*, 1:149.

¹⁴ See Ibn Taymiyyah, *al-Fatāwā*, 19:288.

saying of a Companion or the action of a group of people or an opinion or an analogy or even what some scholars refer to as *ijmā'* (consensus), although this sort of consensus, in fact, does not amount to a real consensus. This is because the definition of *ijmā'* is that all scholars (*mujtahids*) unanimously agree on one opinion concerning a certain matter. What happens, in fact, is that when a certain scholar happens to know of no one who differs with his Imam in a certain matter, then he claims that consensus (*ijmā'*) obtains regarding that particular issue. Such a type of consensus does not discourage Imam Aḥmad from adopting a given *ḥadīth* when it is established as authentic. Instead, he relies on that authentic *ḥadīth* to the exclusion of any other type of evidence.

2. The rulings of the Companions (*fatāwā al-ṣaḥābah*) when not contradicted by other evidence Imam Aḥmad does not consider them as *ijmā'*. Rather he says about them: “ I do not know anything that contradicts them”. These rulings, according to Imam Aḥmad, take precedence over the actions and opinions of other scholars or analogy.

3. In cases where the Companions differ with one another in their rulings with regard to a certain issue, he would, to the best of his ability, select one opinion; otherwise, he limits himself to quoting all their opinions and refrains from opting for a particular viewpoint.

4. The *mursal ḥadīth* (incompletely transmitted) or *ḍa'īf* (weak) would take precedence over analogy. It is necessary to point out in this respect that the *ḥasan* (good) *ḥadīth* used to be classified by the early scholars as a type of *ḍa'īf* (weak) *ḥadīth* as the classification which existed then only distinguished between *ṣaḥīḥ* (authentic) and *ḍa'īf* (weak) *ḥadīths*. Anything markedly weak, like a *mawḍū'* (fabricated) or *matrūk* (abandoned) *ḥadīth* was rejected outright by Imam Aḥmad and he prohibited relying on it as evidence.

5. *Qiyās* (analogy). Imam Aḥmad would use it in cases of necessity that is in the absence of all other types of evidence. He used to caution his students about passing a verdict regarding a matter with no precedent and where other Imams had no opinions previously. Instead, he would easily give the answer of "I do not know" to many questions put to him, very much like the Imams and great scholars prior to him. Thus we can see that Imam Aḥmad's *madhhab* is based on *fiqh al-dalīl* (following the evidence from Qur'ān and *sunnah*) rather than on *fiqh al-'aql* (following analogy and reasoning). This, perhaps, is the most distinguishing feature of Imam Aḥmad's *madhhab*, and this explains why Imam Aḥmad collected as many evidences from Qur'ān and *sunnah* and from the sayings of the Companions (*āthār*) as possible.

CHAPTER 4: EXAMINATION OF THE DEVELOPMENTAL STAGES OF AL-TANQĪH

4.1 AL-TA'LĪQ AL-KABĪR OF ABŪ YA'LĀ

4.1.1 BIOGRAPHY OF ABŪ YA'LĀ (458/1066)

Abū Ya'lā, whose full name was Muḥammad b. al-Ḥusayn b. Muḥammad b. Khalaf b. Aḥmad b. al-Farrā', was commonly referred to as al-Qāḍī Abū Ya'lā due to his being a *qāḍī* (judge).

Abū Ya'lā was born in Baghdad on the 28th of Muḥarram, 380H.¹ (27/4/990) At this point in history, Baghdad was considered to be one of the largest centres of learning of its day. Inevitably, residing in the midst of such an extraordinary environment had a great effect on Abū Ya'lā. As a consequence, his desire to study Islam, and Islamic law in particular, flourished. Moreover, the father of Abū Ya'lā, namely al-Ḥusayn, also had a background in this very field. al-Ḥusayn was a graduate of Islamic law attained under the instruction of Abū Bakr al-Rāzī, known to be one of the greatest *Ḥanafī* jurisconsults, and, with time, al-Ḥusayn also gained a reputable and honourable status for his abilities.

¹ See al-Qāḍī Abū al-Ḥusayn Muḥammad Ibn Abū Ya'lā, *Ṭabaqāt al-ḥanābilah*, 2:194, Beirut; Dār al-Ma'rifah.

Al-Ḥusayn, considered to be a pious and righteous man, was very keen to instill a sense of uprightness and honour in his young son. This prompted him to steer Abū Ya'lā towards a religious education from a very early age. In fact, at the age of five, Abū Ya'lā was being taught *ḥadīth* (tradition). Over the following five years, Abū Ya'lā's abilities shone through and his interest in the Islamic sciences burgeoned. At the age of ten Abū Ya'lā began studying *fiqh* (jurisprudence) under the watchful eye of a Ḥanbalī teacher named Ibn Mufriḥah al-Muqri'. As a result of his intellectual brilliance and obvious potential, the young boy was entrusted to the head of the Ḥanbalī school at that time, Imam Abū 'Abd Allāh al-Ḥasan b. Ḥāmid² (d. 403/1012).

On maturity, al-Qāḍī Abū Ya'lā spent the remainder of his life in the pursuit of knowledge. He continued studying whilst, at the same time, he taught students Islamic law. In addition, he wrote many valuable works and treatises on various areas of Islamic jurisprudence. Despite such activity, Abū Ya'lā was becoming old and inevitably this fountain of knowledge had to pass away. Abū Ya'lā died at the age

² See Ibn Mufliḥ, *al-Maqṣad al-arshad fī dhikr aṣṣhāb al-imām Aḥmad*, 1:319; al-Dhahabī, *Siyar a'lām al-nubalā'*, 17:203.

of 78, at the time of *'ishā'* (night prayer), on Monday 20th *Ramaḍān*, 458H. (13th August 1066).³

Throughout his life, Abū Ya'lā was taught both the sciences of *ḥadīth* and *fiqh* under the authority of numerous scholars, many of whom were known for their expertise in their designated fields. The following list of links (*asānīd*) provides some of the more prominent names:

- ◆ A group of scholars, from Abū al-Qāsim al-Baghawī, from Imām Aḥmad Ibn Ḥanbal (d. 241/855).
- ◆ Abū al-Qāsim Mūsā b. 'Īsā al-Sarrāj, from al-Baghawī 'Abd Allāh b. Muḥammad (214-317/829-929)⁴.
- ◆ Abū al-Ḥusayn al-Sukkarī, from Aḥmad Ibn 'Abd al-Jabbār al-Ṣūfī, from Yaḥyā b. Ma'īn (233/847).

As can be deduced from the aforementioned names, Abū Ya'lā associated with and gained knowledge from the renowned Islamic scholars of his age.

Further, with the intention of broadening his learning at the hands of the finest teachers, Abū Ya'lā traveled far and wide in the pursuit of knowledge. He sought knowledge in many cities including Mecca, Aleppo, and Damascus.

³ See Ibn al-Jawzī, *al-Muntaẓam*, 16:99, ed. Muḥammad 'Abd al-Qādir 'Aṭā, Beirut; Dār al-kutub

All the while, Abū Ya'lā was also teaching his own students. Of the ones who became well known are:

- ◆ **Abū al-Khaṭṭab Maḥfūz b. Aḥmad al-Kalwadhānī** (432-510/ 1040-1116), the author of *al-Intiṣār fī al-masā'il al-kibār*, one of the most important references of Ḥanbalī *fiqh*.⁵
- ◆ **Ibn 'Aqīl Abū al-Wafā' 'Alī b. 'Aqīl b. Muḥammad** (431-513/1039-1119), the author of *al-Funūn*⁶ and *al-Wāḍiḥ fī 'uṣūl al-fiqh*.⁷
- ◆ **Abū Bakr al-Khaṭīb al-Baghdādī** (463/1070), the author of *Tārīkh Baghdād*.
- ◆ **Abū Ja'far 'Abd al-Khālīq b. 'Īsā al-'Abbāsī al-Hāshimī** (411- 480/1020-1077)⁸, the author of *Ru'ūs al-masā'il fī al-khilāf*, which featured 1960 issues. His methodology in this book is the same as that of his teacher, Abū Ya'lā.

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al-'ilmiyyah, 1999.

⁴ See his biography in al-Dhahabī's *Siyar*: 14:440-457.

⁵ A part of *al-Intiṣār* was edited and published in Saudi Arabia in 1993.

⁶ It is currently said that the book was in more than 400 volumes. This is according to al-Dhahabī in his *Siyar* 19:445. What is found is only 2 volumes, which were edited by George Maqdisi in Beirut 1969.

⁷ It was edited by George Maqdisi.

⁸ See al-Dhahabī, *Siyar a'lām al-nubalā'*:18:456.

This is in addition to numerous other distinguished scholars studied under the instruction of Abū Ya'lā and graduated from his school.

Abu Ya'lā's eminent status as a scholar was confirmed by the statements of his students and contemporaries. al-Khaṭīb al-Baghdādī, one of Abū Ya'lā's students, is noted to have said, "We have written down from Abū Ya'lā and consider him to be trustworthy."⁹ Furthermore, Ibn al-Jawzī testified with regard to the nature of Abū Ya'lā, "He was one of the masters in trustworthiness."¹⁰ al-Dhahabī commented, "He gave legal opinions, taught many Ḥanbalī fellows who proceeded to graduate under his instruction, and he reached the highest level in *fiqh* (jurisprudence). He was the scholar of Iraq in his era, with complete and sound knowledge of the science of the Qur'ān, its interpretation, debates and jurisprudential foundations."¹¹ Besides these accolades, Ibn Kathīr adds, "He was the master of the Ḥanbalīs (*shaykhu al-Ḥanābilah*) assisting and facilitating the Ḥanbalī school of law."¹²

⁹ See al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, 2:252.

¹⁰ See *al-Muntaẓim*, 16:99.

¹¹ "Aftā wa darras wa takharraj bihi al-aṣḥāb wa intahat Ilayhi al-imāmatu fī al-fiqh, wa kān 'ālim al-'Iraq fī zamānih ma'a ma'rifatin bi'ulūm al-Qur'ān wa tafsīrih wa al-nazar wa al-uṣūl". See, *Siyar a'lām al-nubalā'*, 18:90.

¹² "Shaykh al-ḥanābilah wa mumahhid madhhabihim fī al-furū'". See Ibn Kathīr *al-Bidāyah wa al-nihāyah*, 16:10.

One of the most pronounced moments in the life of al-Qaḍī lay in the recognition of his abilities by the caliph of the day, al-Qā'im bi amri Allāh (Abū Ja'far 'Abd Allah b. Aḥmad 391-467/1000-1076)¹³. The caliph requested Abū Ya'lā to put into practice his knowledge of Islamic law and proceeded to offer him the post of judge. He resisted such a post and harboured little desire for it. Yet, regardless of Abū Ya'lā's stance, the caliph went ahead and nominated him for the honourable position. On this basis, Abū Ya'lā was obliged to yield and accept the placement at the insistence of the caliph. However, he did not oblige without first laying down requisite conditions. These included his being excused from attending ceremonial cavalcades, and formal receptions or visits to the sultan's palace. Finally, on mutual agreement of the conditions, Abū Ya'lā submitted to the will of the caliph and became *al-Qāḍī* (The Judge).¹⁴

Notably, the majority of those who have written about Abū Ya'lā have failed to comment on or praise his abilities in the science of *ḥadīth*. The exception to this lack of documented observation is a remark made by al-Dhahabī who declared, "Abū Ya'lā was a man of worship and night-prayers and continuous writing. However, he

¹³ See Ibn Kathīr, *al-Bidāyah wa al-nihāyah*, 16:47-49.

¹⁴ al-Qaḍī Abū al-Ḥusayn, *Ṭabaqāt al-Ḥanābilah*, 2:205-206. George Makdisi, *The Rise of Colleges*, p.154.

was not conversant in *ḥadīth* and may have been prone to the use of very weak *ḥadīth*.”¹⁵

At the time of Imām Ibn Ḥāmid's death, Abū-Ya'lā was still his student. However, on the demise of his teacher, Abū Ya'lā proceeded to fill Imam Ibn Ḥāmid's role as a teacher. Besides this, Abū Ya'lā began compiling books. These works were of such stature¹⁶ that they soon became the first point of reference for successive Ḥanbalī scholars. Among the works of Abū Ya'lā, probably the most important which have been published are the following:

(i) *'Ibtāl al-ta'wīlāt*

Within this book,¹⁷ Abu Ya'lā elucidates what the *ahl al-sunnah* believe with regard to the Qur'ān and the attributes of Allah. Notably, it is documented that the son of Abū Ya'lā, al-Qāḍī Abū al-Ḥusayn, remarked that when the book spread, a dissension arose among the people. As a result, a conference was held in the palace

¹⁵ “*Kān dhā 'ibadah wa tahajjud wa mulazamah li al-taṣnīf walam takun lahu yadun ṭūlā fī ma'rifati al-ḥadīth fa rubbamā iḥtajja bi al-wāḥī*.” See *Siyar a'lām al-nubalā'*, 18:91.

¹⁶ See al-Qāḍī Abū al-Ḥusayn, *Ṭabaqāt al-Ḥanābilah*, 2:205-206 in which he mentioned all his works. See also al-Dhahabī, *Siyar a'lām al-nubalā'*, 18:91.

¹⁷ The book was published recently in Kuwait as a two-volume edition, ed. Muḥammad al-Ḥumūd.

of Caliph al-Qā'im bi amri Allāh (Abū Ja'far 'Abd Allah b. Aḥmad 391-467/1000-1076)¹⁸.

The assembly took place in the year 432/1040. It included Abū Ya'lā, Abū al-Ḥasan al-Qazwīnī al-Shāfi'ī 'Alī b. 'Umar (360-442/970-1050),¹⁹ Abū al-Ṭayyib al-Ṭabarī Ṭāhir b. 'Abd Allah al-Shāfi'ī (348-450/959-1058)²⁰, and many other notable scholars from various schools of thought. Once the book had been read in front of those gathered, it was agreed that the contents were correct and all the scholars present affirmed this.²¹

(ii) *al-'Uddah fī 'uṣūl al-fiqh*

This book is very much associated with the Ḥanbalīs. Within its pages, Abū Ya'lā reviews the foundations of the Ḥanbalī school of jurisprudence. In addition, he notes a range of pronouncements made by Imam Aḥmad and other scholars. In relation to these, Abū Ya'lā assesses the religious evidence and makes comparisons between the scholars with the overall objective of ascertaining which statement is more true

¹⁸ See Ibn Kathīr, *al-Bidāyah wa al-nihāyah*, 16:47-49.

¹⁹ See al-Dhahabī, *al-Siyar*, 17:609.

²⁰ See al-Dhahabī, *al-Siyar*, 17:668-671.

²¹ See Ibn Abī Ya'lā Abū al-Ḥusayn, *Ṭaqāt al-Ḥanābilah*, 2:197-198 and compare with Ibn Kathīr, *al-Bidāyah wa al-nihāyah*, 15:685.

with regard to underlying proofs. Moreover, Abū Ya'lā, in documenting such sensitive ideas, focuses the reader's attention on the outcome of the dispute and its origin with a strict regard for the manners with which such a debate should proceed.²²

iii. *al-Jāmi' al-ṣaghīr*²³

In his introduction to this book, Abū Ya'lā mentions that he had extracted it from a number of encyclopedic books and that he had based it, on the whole, on controversial issues.²⁴ The book is written along the lines of abridged treatises of *fiqh*, where the author rarely reports the proofs or the controversy between the Imams. The total number of *ḥadīths* featured in the book is 15 *ḥadīths* only. Sometimes, the author reports that there are two different narrations, both from Aḥmad. In the Book of *Jināyāt* (Crimes), for example, he says:

A Muslim cannot be killed in retaliation for a disbeliever, nor a freeman for a slave, nor a father for his son. A disbeliever can be killed in retaliation for a Muslim, a slave for a freeman, and a son for his father. It is also legitimate to kill a man for a woman, a woman for a man and a slave for a slave. Retaliation is permissible between a man and a woman in a crime less than murder, and the same is true between two slaves. A group of people can be killed in retaliation for an individual

²² This book was published as a five-volume edition, ed. Aḥmad Sayr al-Mubārakī, Riyāḍ; 1980.

²³ This book was printed in Riyādh; 2000, edited by Dr. Nāṣir b. Su'ūd al-Salāmah.

²⁴ See *al-Jāmi' al-ṣaghīr*, p.22.

and an individual for a group of people. There is also another narration from him [i.e. from Imam Aḥmad] that a group cannot be killed for an individual.²⁵

4.1.2 *Al-Ta'liq al-Kabīr Fī al-Masā'il al-Khilāfiyyah Bayn al'Ulamā'*²⁶

It is also referred to as '*al-Khilāf al-kabīr*'.²⁷ This work is the origin of the present study. It is considered to be one of the primary sources of reference for those who wish to access the authentic documented views of Imam Aḥmad. It is on this basis that many notable jurists relied on it. For instance, Ibn Taymiyyah, one of the Ḥanbalī master jurisconsults, often used it as a reference. In fact, during a period of incarceration, he sent word to his family, requesting specific volumes of the book to be sent to him. Also, as documented, once an individual asked Ibn Taymiyyah about Ḥanbalī references. The individual was hoping to validate the authenticity of two or more dictums attributed to Imam Aḥmad. Ibn Taymiyyah informed the student that he could ascertain the authenticity by referring to the *Ta'liq* of al-Qaḍī Abū Ya'lā.²⁸

²⁵ See *al-Jāmi' al-ṣaḡhīr*, section on *jināyāt*, p. 285.

²⁶ There is a copy of the manuscript in *Fezullah library* and *Dar al-Kutub al-Miṣriyya* holds the third volume. It begins with *kitāb al-Ḥajj* and ends with *Abwāb Al-salām*. Dr. 'Awwāḍ Al-'Amrī, of the Islamic University in Madīnah, edited and studied the section entitled *al-ḥajj*. He submitted his research as a PhD dissertation in 1988. However, according to Ibn Taymiyyah, the manuscript is in eleven volumes. See *al-'Uqūd al-Durriyyah*, p. 258.

²⁷ See Ibn Abī Ya'lā Abū al-Ḥusayn, *Ṭaqāt al-Ḥanābilah*, 2:206.

²⁸ See Ibn Taymiyyah, *al-Fatāwā* 20:227.

Moreover, 'Abd al-Qādir b. Badrān (1267-1346/1850-1927)²⁹ noted that the most comprehensive work he had ever seen written by a Ḥanbalī jurist was '*al-Khilāf al-kabīr*' of Abū Ya'lā. He said:

The book is in many volumes but I have seen only the 3rd volume. Abū Ya'lā used an array of diverse methods in the book, but most prominent was his ability to refute the arguments of the litigant in a way I have never encountered before.”³⁰

It is quoted that Ibn Taymiyyah said it [i.e. *al-Ta'līq*] consists of 11 volumes.³¹

Unfortunately, nothing of that valuable treasure has been found yet, except volume 4, which starts with the section on *i'tikāf*, then the section on *ḥajj*³² and ends with a section on business transactions.³³ Two manuscript exist: one in Egypt, in the *Dār al-kutub al-Miṣriyyah*, and one in Turkey, in the Feyzullah Library.

²⁹ See 'Umar Kaḥḥālāh, *Mu'jam al-mu'allifīn*, 2:184.

³⁰ See 'Abd al-Qādir b. Badrān, *al-Madkhal ilā madhhab al-imām Aḥmad b. Ḥanbal*, p. 231.

³¹ See Ibn 'Abd al-Hādī Muḥammad b. Aḥmad (705-744/1305-1343), *al-'Uqūd al-durriyyah*, p. 285.

³² It was edited in the Islāmic University in Madīnah in 1988 by 'Awwaḍ al-'Amrī.

³³ This section was edited by 'Abd Allah al-Dikhīl as a PhD thesis in 1996 at Muḥammad b. Su'ūd University in Riyāḍ.

In fact, *al-Ta'līq*, is considered to be one of the most massive works on controversial issues. Ibn Taymiyyah who was in high pertinence with *al-Taqlīq* indicated that its issues amount to some 4000 or so.³⁴

Since this book was the main source used by Ibn al-Jawzī for his *al-Taḥqīq*, and the main source used by al-Dhahabī for his *al-Tanqīh*, it is necessary to devote a special section to this key reference.

(i) The Manuscript's Description

As mentioned above, most of the manuscript is currently missing and only Volume Four is available³⁵. This volume comprises 312 folios and finishes with Part 39 of the book, which means that every volume comprises on average between 9 and 10 parts and every part is made up of 30 to 32 folios. It seems that the division of the book into parts was done by the author himself, whereas its division into volumes was done at a later time by the scribes. This can be evidenced by the fact that 'Abd al-Qādir b. Badrān, the Ḥanbalī scholar (d.1364/1928), reported that he had examined Volume Three of the book, which begins with the section on *ḥajj*

³⁴ See Ibn Taymiyyah, *al-Istiḳāmah*, 1:62-63, ed. Muḥammad Rashād Sālim, Riyaḍ; University of Imām Muḥammad b. Su'ūd, 1983.

³⁵ Its manuscript is in Fezullah Library in Turkey, No.695. A copy of it exists in the Islamic University Library in Al-Madīnah Al-Munawwarah.

(pilgrimage) and finishes with the section on *salam* (postponed sales)³⁶. This is at variance with the data from the manuscript currently available, which consist of Volume Four, and which start with section on *i'tikāf* and finish with one of the sections on business transactions. Thus, according to our manuscripts, the section on *ḥajj* should be in Volume Four, whereas the section on *salam* should be in Volume Five. Presumably, the volume divisions of the copy Ibn Badrān consulted contained more sections than our presently surviving copies of 'Volume Four'.

The currently available volume of the book comprises the following sections:

- (a.) The section on *i'tikāf* (13 issues).
- (b.) The section on *ḥajj* (213 issues).
- (c.) Parts of the section on business transactions (88 issues).

This makes a total of 332 issues that are featured in this volume, which is an indication of the vastness of this book's scope as the total number of issues it features might well exceed 3300.³⁷

³⁶ See Bakr Abū Zayd, *al-Madkhal*, p.450.

³⁷ Three researchers have already edited the book and printed it.

(ii) The Author's Methodology in this Book

The methodology of the author in his book consists of the following steps: he first starts with the heading '*mas'alah*' (i.e. issue), then he reports all the narrations from Imam Aḥmad and the sayings of the Companions. Then, after mentioning the opinions of the Ḥanbalīs, he mentions the opinions of the other *madhhabs* who are in agreement with the Ḥanbalīs, followed by their respective proofs. Then he moves on to report the opinions of those who disagree with the Ḥanbalīs, reviews their arguments and discusses them. Next, he reports any objections the opponents have and answers them back, all in a scholarly and scientific style, leading eventually to favouring the opinion of Imam Aḥmad.

(iii) The Author's Sources

To write his book, the author relied on the main sources of jurisprudence (*fiqh*), principles of jurisprudence (*uṣūl al-fiqh*), *ḥadīth*, and others. Some of the sources mentioned include:

- (i.) *Ikhtilāf al-'ulamā'* by al-Ṭaḥāwī Aḥmad b. Muḥammad (d.321/933). This book is one of the most important in the discipline of *fiqh* controversy, comprising 130 parts. However, it is missing.³⁸

³⁸ It was abridged by al-Jaṣṣāṣ, Abū Bakr Aḥmad b. 'Alī (d.380/981). It is also printed.

(ii.) *al-Ishrāf 'alā madhāhib ahl al-'ilm* by Ibn al-Mundhir³⁹ (d.318/930). It is one of most important in the discipline of *fiqh* controversy, used as source scholars in all schools of Islamic jurisprudence. Ibn al-Mundhir's method in this book consists of the following: he reports the opinions of the Ḥanafīs from the books of the students of Abū Ḥanīfah, in particular from Muḥammad b. al-Ḥasan al-Shaybānī. He reports the opinions of Mālik from the *Muwaṭṭa'* and the *Mudawwanah*, the opinions of al-Shāfi'ī from *al-Umm*, *al-Risālah* and *Mukhtaṣar al-Muzanī*. Finally, he reports the opinions of Ibn Ḥanbal from the books of *masā'il* compiled by his students like Abū Dāwūd al-Sijistānī, the author of *al-Sunan*, and Ishāq al-Kawsaj. Ibn al-Mundhir stood out as being an Imam and *mujtahid*, with no bias to any particular Imam or school of thought. Instead, he favoured the opinions supported by the strongest evidence. His book features 2030 issues.

(iii.) *Ḥadīth* sources, such as *Musnad Aḥmad*, *Musnad al-Ḥumaydī*, the *Muwaṭṭa'* of Imam Mālik, the *Sunan* of Abū Dāwūd and the *Sunan* of al-Dāraqutnī, and others.

What demonstrates the importance of *al-Ta'līq* is the fact that scholars took a special interest in it. It was abridged by al-'Ukburī Abū al-Mawāhib al-Ḥusayn b.

³⁹ It was edited by Muḥammad Najīb Sirāj and printed in Qatar; 1986.

Muḥammad, a student of al-Qāḍī Abū Ya'lā, in his book *Ru'ūs al-masā'il al-khilāfiyyah*, which features 2363 issues in addition to a number of other issues featured under the heading "*faṣl*" (siction). It was also abridged by another student of his, Abū Ja'far 'Abd al-Khāliq b. 'Isā al-'Abbāsī (411-480/1020-1077)⁴⁰ in a book featuring 1960 issues. His methodology in this book was no different from his teacher's (i.e. Abū Ya'lā).

The remaining books, namely, *al-Taḥqīq* of Ibn al-Jawzī and *al-Tanqīḥ* of al-Dhahabī, will be reviewed in turn in the later sections of this thesis.

⁴⁰ See al-Dhahabī, *Siyar a'lām al-nubalā'*:18:456.

4.2 AL-TAḤQĪQ OF IBN AL-JAWZĪ

4.2.1 BIOGRAPHY OF IBN AL-JAWZĪ (597/1201)

The full name of Ibn al-Jawzī is 'Abd al-Raḥmān b. 'Alī b. Muḥammad b. 'Alī and his surname is Jamāl al-Dīn Abū al-Faraj. He was commonly referred to as Ibn al-Jawzī. However, the origin of this name is not definitely known. According to one source, which is documented that an ancestor of the scholar, named Ja'far, was given the surname al-Jawzī. There are various explanations as to how this occurred. One theory suggests there existed a jetty in Baṣrah called *Jawzah* frequented by Ja'far; another proposes it is because he was living in an area named the *Jawzah* quarter; according to yet other sources, Ja'far was the only man in Wāṣiṭ who had the *jawza* tree of nutmeg in his courtyard¹. However, it should be noted that all such theories are uncorroborated. Despite this, there are confirmed reports regarding the fact the Ibn al-Jawzī is descended from the bloodline of the Caliph Abū Bākr al-Ṣiddīq.

There exists disagreement about Ibn al-Jawzī's exact date of birth but it is calculated to be either (511/1117) or (512/1118). According to Ibn Rajab, among Ibn al-Jawzī's papers there was a note in which he had written that he was unsure of the year of his birth. However, he pointed to the fact that his mother had told him that he had been three years of age at the time of his father's death in (514/1120), thus, putting the

year of his birth at (511/1117) ². It was some years after his father's demise that Ibn al-Jawzī began his long career in the pursuit of Islamic knowledge at the tender age of six. By the time of his death in (597/1201), Ibn al-Jawzī was approximately 86 years old. He succumbed to a five day illness in the comfort of his home quarters on Friday 13th *Rāmāḍān* 597/ 15th June, 1201.

The teachers of Ibn al-Jawzī are too numerous to mention. Suffice it to say that he studied the sacred texts of Islam under the instruction of more than eighty teachers as documented in Ibn al-Jawzī's *Mashyakhah* ³.

Of those who benefited from the teachings of Ibn al-Jawzī, many went on to become renowned scholars in their own right. These include al-Ḥafīẓ 'Abd al-Ghanī al-Maqdisī (d. 600/1203), author of *al-Kamāl fī asmā' al-rijāl* ⁴; Ibn Qudāmah al-

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¹ See al-Dhahabī, *Siyar a'lām al-nubalā'*, 21:372.

² See *Dhayl Ṭabaqāt al-Ḥanābilah*, 3:400, Beirut; Dar al-Ma'rifah., also *Siyar 'a'lām al-nubalā'*, 21:372.

³ *Mashyakhah* refers to the biographical collection of the author's masters. al-Ẓāhiriyya Library holds a manuscript of *The Mashyakhah of Ibn al-Jawzī* in no. 101. It was also printed twice in 1977, 1980 edited by Muḥammad Maḥfūẓ.

⁴ See Ibn Kathīr, *al-Bidāyah wa al-nihāyah*, 16:732.

Maqdisī (d. 620/1223)⁵, the author of *al-Mughnī sharḥ Mukhtaṣar al-Khiraqī*; and, al-Ḍiyā' al-Maqdisī (d. 643/1245), author of *al-Mukhtārah*⁶. However, it should be noted that this list is by no means exhaustive.

Ibn al-Jawzī's status as a distinguished scholar of his day is further substantiated by the encyclopaedic approach with which he compiled his works. His contribution to Islamic literature is said to have adorned the shelves of a wide range of subjects including Qur'anic studies, *ḥadīth*, *fiqh*, Arabic linguistics, art, history and medicine to name but a few. Ibn Kathīr, in his own scholarly work entitled *al-Bidāyah wa al-nihāyah* referred to him as an outstanding scholar of his age with regard to his ability to sermonize.⁷

Notably though, Ibn Kathīr did not meticulously scrutinize those books of Ibn al-Jawzī which led Ibn al-Jawzī to be denounced by other prominent scholars. Specifically, he was criticised for his remarks on the subject of creed (*'aqīdah*). It was felt that his opinions contradicted the creed of those considered to be the rightly guided people of *ahl al-sunnah wal jamā'ah*. In relation to this, Ibn Qudāmah considered Ibn al-Jawzī to be a man familiar with many fields of knowledge, well

⁵ Ibn Kathīr, *al-Bidāyah wa al-nihāyah*, 17:116.

⁶ Ibn Kathīr, *al-Bidāyah wa al-nihāyah*, 17:284.

versed in the intricacies of *fiqh* and a *ḥāfiẓ*.⁸ Yet still, Ibn Qudāmah defamed his work saying that, "We are not satisfied with Ibn al-Jawzī's writings or approach to the topic of the creed '*aqīdah* of the *ahl al sunnah*.'" ⁹ al-Dhahabī stated that he wished that he [i.e. Ibn al-Jawzī] had not rushed into *ta'wīl*¹⁰ and, thus, avoided disagreement with his Imam [i.e. Aḥmad b. Ḥanbal].¹¹

In relation to the many works compiled by Ibn al-Jawzī during his lifetime, al-Dhahabī comments, "Ibn al-Jawzī's compilations exceed three hundred and forty in number. They vary hugely in size ranging from works of twenty volumes to booklets. I cannot imagine that there was enough time [in his life] to be able to do so." al-Dhahabī also stated, "I have never known anyone compile books as he [Ibn al-Jawzī] did."¹²

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⁷ "*Kāna 'ustādhan fardan fī al-wa'z*" See *al-Bidāyah wa al-nihāyah* of Ibn Kathīr, 16:708.

⁸ A transmitter of *ḥadīth* endowed with excellence of memory.

⁹ "*Kān ṣāhib funūn, kān yuṣannif fī al-fiqh wa yudarris, wa kān ḥāfiẓan lilḥadīth illā annanā lam narq taṣanīfah fī al-sunnah wa lā ṭarīqatahu fīhā.*" *Siyar a'lām al-nubalā'*, 21:381-382.

¹⁰ *Ta'wīl* has many different meanings. One of them is the approach of interpretation of the texts which focuses on the underlying as opposed to the apparent meaning.

¹¹ *Laytahu lam yakhuḍfī al-ta'wīl wa lam yukhālīf imamahu*". *Siyar a'lām al-nubalā'*, 21:368.

¹² *Tasānīfuhu tazīd 'lā thalāthumi'atin wa arba'īn muṣannaḥ, mā bayn 'ishrīn mujalladan ilā kurrās, wa mā aẓunnu azzamān yasmaḥu bimithlihi.*" *Siyar a'lām al-Nubalā'*, 21:348.

Some of the more popular and commonly used books of Ibn al-Jawzī are as follows:

i. *Zād al-masār fī 'ilm al-tafsīr*

This work amounts to nine volumes. He documents the exegesis of scholars that preceded him in relation to each verse of the Qur'ān. However, he does not mention the *isnāds*.¹³

ii. *al-Muntaẓam fī akhbār al-mulūk wa al-'umam*

This is a substantial and oft quoted treatise on history. Notably, Ibn Kathīr refers to it repeatedly in his own works.¹⁴

iii. *Talbīs Iblīs*

Within the context of this book, Ibn al-Jawzi demonstrates the deceptive methods by which the Devil (*iblis*) managed to deceive people such as the Kharijites, Shiites, and the *Bāṭiniyyah* away from the correct path, namely that of adherence to the *sunna*.

¹³ It was published in Beirut by al-Maktab al-Islamī, ed. Zuhayr al-Shāwīsh.

¹⁴ See *al-Bidāyah wa al-nihāyah*, 16:707.

4.2.2 Ibn Al-Jawzī's *al-Taḥqīq fī masā'il al-Khilāf*

A. Reasons For Writing *al-Taḥqīq fī masā'il al-Khilāf*

Within the introductory section of *al-Taḥqīq fī masā'il al-Khilāf*, Ibn al-Jawzī discusses his reasons for writing this treatise. These can be summed up as follows:

1. For a lengthy period of time there had been a call, as voiced by his teachers and contemporaries, for the examination of the authenticity of the *ḥadīths* of *Kitāb al-Ta'līq* of al-Qādī Abū Ya'lā. In effect, it was felt that there was a dire need to be able to distinguish the correct from the weak *ḥadīths*.
2. Ibn al-Jawzī examined the books of commentaries and discovered that the majority of the *fuqahā'* relied on incorrect *ḥadīth*. Moreover, the later *fuqahā'* were prone to draw on those *ḥadīths* used by their predecessors, as they themselves were not well versed in *ḥadīth* knowledge.

B. Ibn al-Jawzī's Methodology In *al-Taḥqīq fī masā'il al-khilāf*

1. Ibn al-Jawzī uses headings to separate *fiqh* subject matters. He outlines the stance of the Ḥanbalīs and then proceeds to discuss the agreement and disagreement of other scholars.
2. Ibn al-Jawzī then examines the *ḥadīth* which Abū Ya'lā includes. The author proceeds to document the corroborating evidence of the Hanbalites (giving them precedence) and follows these with the evidences of opponents.

3. The author refers to the original sources of the *ḥadīth*, namely the Six Books of *ḥadīth*, and examines the chains of narration from these in an effort to verify the authenticity of the *ḥadīth*.

4. *Ḥadīth* are further examined by Ibn al-Jawzī in that he judges them as either correct or weak, all the while expounding his reasons for doing so. However, Ibn al-Jawzī does not examine the *ḥadīth* to such a level of depth as would create excessive length in the text and boredom for the reader. The author limits his writing to what will suffice for the purpose of his aim.

5. The author, in his final judgements, is meticulous in his documentation of views both for and against his own. This is due to the fact that Ibn al-Jawzī strongly disliked the concept of blind following or *taqlīd*. As suggested by the words of Imam Wakī' Ibn al-Jarrāḥ:

The people of knowledge document both what is for them and what is against them. However, the people of desires note only that which is for them.

6. Ibn al-Jawzī does not mention in his introduction whether he meant to write an abridgement of *al-Ta'liq*. However, this is in fact what happened, as the number of the issues in *al-Taḥqīq* is only 817, that is, less than a 1/4 of the issues featured in the original, i.e. *al-Ta'liq*. This can be justified by the explanation Ibn al-Jawzī provides in the introduction to his book, stating that he wanted to edit the *ḥadīths* contained in the book (apparently referring to the *fiqh* issues which are controversial among the

scholars due to a controversy around the *ḥadīths* in them). However, we cannot guarantee the total commitment of Ibn al-Jawzī to his initial remit. It is not possible, either, to check whether there were issues he missed to edit their *ḥadīths*, and whether he introduced any new issues in his book which did not exist in the original book. The reason is that the majority of *al-Ta'liq* is missing. However, as a remedy, I have attempted a comparison between *al-Taḥqīq* by Ibn al-Jawzī and al-'Ukburī's book *Ru'ūs al-masā'il al-khilāfiyyah*, which, as stated above, is an abridgement of *al-Ta'liq*. I have found that the issues featured in *Ru'ūs al-masā'il al-khilāfiyyah* and not featured in *al-Taḥqīq* are mostly issues considered as controversial due to the scholars' own opinions. Some of them contain a *ḥadīth* or the saying of a Companion (*athar*), but are not featured by Ibn al-Jawzī. These issues could well be further investigated and featured in a separate book.

4.3 TANQIḤ AL-TAḤQĪQ OF AL-DHAHABĪ

4.3.1 BIOGRAPHY OF AL-DHAHABĪ (748/1348)

Al-Dhahabī was born in Mayyāfāriqīn on the 1st or 3rd of Rabī‘ II, 673AH (5th or 7th October 1274). al-Dhahabī’s full name was Muḥammad Ibn Aḥmad Ibn ‘Uthmān Ibn Qāyimāz al-Turkumānī al-Dimashqī al-Shāfi‘ī, Abu ‘Abd Allāh. However, he was given the name al-Dhahabī due to the fact that his father was a goldsmith.¹ Ibn al-Dhahabī was the name used by al-Dhahabī for signatory purposes. Assuming his father's role, the young al-Dhahabī also became a goldsmith. Hence, he retained the trade-specific surname.

Al-Dhahabī’s early years were spent in the midst of a religious family environment, with many of his relatives well versed in the religious sciences. His father, a pious man regular in his performance of the night prayers, was familiar with the tenets of Islamic law and *Ṣaḥīḥ al-Bukhārī*. In addition, al-Dhahabī’s aunt and wet nurse, namely Sitt al-ahl bint ‘Uthmān, had acquired a formal certificate (*ijāzah*)² for her studies with a group of scholars. Further, two of his uncles were also educated in the

¹ See Encyclopaedia of Islam, vol. 1, p.954-956.

² An *ijāzah* guarantees the authoritative transmission of a book, giving evidence that the person named in the certificate had studied the work under the direction of the author, or of a duly authorized person, belonging to a chain of transmitters going back to the author. See George Maqdisi, *The Rise of Humanism in Classical Islam and the Christian West*, p.77, Edinburgh University Press 1990.

sciences of religion: al-Dhahabī's maternal uncle 'Alī b. Sinjar al-Mūṣilī later became his teacher (d.736/1335) and another uncle (*zawj khālatih*) Aḥmad .b. 'Abd al-Ghanī al-Dhahabī, surnamed Ibn al-Ḥarastānī, was both a *ḥāfiẓ* of Qur'ān and an avid reader of *ḥadīth* (d.700/1300). Moreover, his foster brother, 'Alā' al-dīn 'Alī b. Ibrāhīm b. Dāwūd b. al-'Aṭṭār al-Shāfi'ī, gained the *ijāzah* from a group of scholars for al-Dhahabī.

Thus, it can be concluded that al-Dhahabī was nurtured within the context of a highly religious and learned family setting. Undoubtedly, such an environment had a profound influence on his forthcoming academic career. As expected, al-Dhahabī began his studies and succeeded in memorising the Qur'ān with *qir'ā'āt*³. His abilities in this field caught the attention of his teacher, al-Dimyāṭī⁴ Abū 'Abd Allāh Muḥammad b. 'Abd al-'Azīz (693/1294)⁵, who during the period of his illness, placed al-Dhahabī at the head of the circle (*ḥalqah*)⁶ of teaching *qir'ā'āt* in the Umayyad Mosque in Damascus. As well as excelling in the field of *qir'ā'āt*, al-

³ Different ways of reciting certain verses of the Qur'ān.

⁴ Dimyāṭ is a village in Egypt. See al-Sam'ānī, *al-Ansāb*, 3:577.

⁵ See al-Dhahabī, *Mu'jam al-shuyūkh*, 2:218.

⁶ A lesson or a lecture involving students sitting with their teacher in a circle. Usually occurs in mosques, though, not mandatory.

Dhahabī also studied Arabic grammar and linguistics and Shāfi'ī jurisprudence. By the time he was eighteen, he began specializing in the science of *ḥadīth*, a discipline which required him to travel far and wide.

In the final years of his life, al-Dhahabī experienced a sharp deterioration in his vision until, finally, blindness set in.⁷ He died in Damascus at the age of seventy-five during the night of Sunday 3rd *Dhulqa'dah* 748AH (3rd of February, 1348).

A. The Teachers and Students of al-Dhahabī

al-Dhahabī spared no effort to acquire Islamic knowledge. He traveled extensively and studied under a great number of teachers. He aggregated all the names of his teachers in a book he entitled *Mu'jam al-shuyūkh*,⁸ also known as *al-Mu'jam al-kabīr*. The number of his teachers whose biographies were featured in this book came to 1040. The most prominent among them were:

In Damascus:

- ◆ Aḥmad b. Hibatu Allāh b. 'Asākir⁹ (d. 699/1300).

⁷ There is general consensus regarding the date of death. That is, with the exception of Ibn Iyās al-Ḥanafī who said that it occurred in 744/1343. It could be an error in printing.

⁸ It was edited by Dr. Muḥammad al-Ḥabīb al-Hīlah in two volumes and printed in S.A 1988.

⁹ See al-Dhahabī, *Mu'jam al-shuyūkh*:1:107.

- ♦ Muḥammad b. ‘Abd al-Muḥsin b. al-Kharrāṭ al-Ḥanbalī (d. 728/1328).¹⁰ He studied *ḥadīth* under al-Kharrāṭ and accompanied him on the *ḥajj*.

In Egypt:

- ♦ al-Abarqūhī Aḥmad b. Ishāq (d. 701/1302)¹¹ who taught al-Dhahabī the *Sīrah* of Ibn Hishām in six days.¹²
- ♦ Ibn Manẓūr al-Ifriqī Muḥammad b. Mukarram (d. 711/1311).¹³ He was one of the eminent scholars of the Arabic language and the author of the well-known book in Arabic, *Lisān al-‘Arab*.
- ♦ Ibn Daqīq al-‘Id Muḥammad b. ‘Alī b. Wahb al-Qushayrī (d. 702/1302). al-Dhahabī said about him: “ The most eminent scholar of his time. He was an authority (‘*allāmah*) in both *madhhabs* Mālikī and Shāfi‘ī, and well-versed in *ḥadīth* and its various disciplines”.¹⁴

The most prominent and most oft mentioned among his students were:

¹⁰ See al-Dhahabī, *mu‘jam al-shuyūkh*:2:225-226.

¹¹ See al-Dhahabī, *mu‘jam al-shuyūkh*:1:37-38.

¹² See Dr. Bashshār ‘Awwād in his introduction to al-Dhahabī’s *Siyar*, p.30.

¹³ See al-Dhahabī, *Mu‘jam al-shuyūkh*: 2:277.

¹⁴ See al-Dhahabī, *Mu‘jam al-shuyūkh*:2:249.

- ♦ al-Subkī ‘Abd al-Wahhāb b. ‘Alī (d. 771/1369), the author of the *Ṭabaqāt al-shāfi‘īyyah*.
- ♦ Ibn Kathīr Ismā‘īl al-Shāfi‘ī (774/1372), the author of *al-Bidāyah wa al-nihāyah*, and the *Tafsīr al-Qur’ān*.

B. Al-Dhahabī’s Scholarly Status

Concerning al-Dhahabī’s status as a scholar, it is possible to assess his expertise by way of assessing three factors: the commendations of al-Dhahabī by others, his own works, and his academic standing. Each will be assessed in turn.

1. Commendations of al-Dhahabī by Others

Al-Dhahabī has the reputation of a scholar of the first rank in history and in the science of *ḥadīth*. In fact, he was referred to as *shaykh al-muḥaddithīn*, which can be translated as Master of the science of *ḥadīth*.

Ibn Kathīr said about al-Dhahabī, “He was a historian of Islām, Master of *ḥadīth* and by him the *ḥadīth* experts have been sealed.”¹⁵ In his own works Ibn Kathīr relied upon al-Dhahabī’s judgements to a large extent. Notably, he always preceded each

reference to al-Dhahabī with a very polite introduction. For instance, ‘Our master, the memorizer Abū ‘Abd Allāh al-Dhahabī said such and such’.¹⁶

Ṣalāḥ al-Dīn al-Ṣafadī commented:

I have learned from him and read under his direction many of his compilations. I did not find the inactivity of *ḥadīth* experts in his manner nor the dullness of the transmitters. Rather he was shrewd with extensive experience in scholarly sayings. I was impressed by the thoroughness of his books. He also did not leave any *ḥadīth* behind until he had clarified it with regard to the weakness of its text or chain and the eligibility of the transmitters. Moreover, I have never seen any one to be so considerate of these factors.¹⁷

Ibn Ḥajar remarked, “He was the authority of his era in his critique of the science of credibility. He was sharp witted and shrewd. His fame suffices him.”¹⁸

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¹⁵ “*Mu'arrikh al-Islām, wa shaykhu al-muḥaddithīn, wa qad khutim bihi shuyūkh al-ḥadīth wa ḥuffāẓuh*. See: Ibn Kāthīr, *al-Bidāyah wa al-nihāyah*, 14:225, Beirut; *maktabat al-Ma'ārif*, 1st edition, 1996.

¹⁶ See *al-Bidāyah wa al-nihāyah*, 7:668, 8:568, 19:216.

¹⁷ “*akhadhtu ‘anhu wa qara'tu ‘alayhi kathīran min taṣānīfihi wa lam ajid ‘indahu jumūd al-muḥaddithīn wa lā kawdanat al-naqalah, bal huwa faqīh al-naẓar lahū durbatin bi aqwāl al-nās wa madhāhib al-a'imma mina al-salaf wa arbāb al-maqālāt, wa a'jabanī minhu mā yu'ānīhi fī taṣānīfihi, thumma innahu lā yata'addā ḥadīthan ḥattā yubayyin mā fīhi min ḍa'fi matnin aw ḥalāmi isnadin aw ṭa'īn fī riwāyatihi wa ḥādḥā mā lam ara ghayrahu yurā'ī ḥādhihi al-fā'idah*.” See Ibn Taghrī Bardī al-Atābikī (d.874/1443), *al-Nujūm al-zāhirah fī mūlūk Miṣr wa al-Qāhirah*, 10:144-145, Beirut; Dār al-kutub al-‘ilmiyyah, 1992.

¹⁸ “*kān ‘allāmata zamānihi fī al-rijāl wa aḥwālīhim, ḥadīd al-fahm, thāqib al-dhihn, wa shuhratuhu tughnī ‘an al-iṭnābi fīh*.”

2. Al-Dhahabī's Works

All those who wrote about al-Dhahabī mentioned the quality of his books. These include the following: *Tārīkh al-Islam*; *Siyar a'lām al-nubalā'* which is a significant accomplishment and provides a critique of many sciences as well as various valuable comments regarding creed, jurisprudence, poetry, morals and wisdom; and *Tadhkirat al-ḥuffāẓ*. He also shortened many important works of authors that had gone before him. These included *Al-Sunan al-kubrā* of Al-Bayhaqī, *Al-Muḥallā* of Ibn Ḥazm, *Minḥāj al-sunnah al-nabawiyyah* of Ibn Taymiyah and many others.

3. al Dhahabī's Academic Standing

al-Dhahabī held the following posts during his life:

- ◆ He supervised the Qur'ānic circle in the Umawī Mosque following his Shaykh Abū 'Abd Allah Moḥammad b. 'Abd al-'Azīz al-Dimyātī from 692-693 (1292-1293).
- ◆ He was *Khaṭīb* (preacher) of Kafr Baṭnā mosque from 703-729 (1303/1328).
- ◆ He held the *Mashyakhah* of *dār al-ḥadīth* in 'Umm al-Ṣāliḥ on 20, *Dhu al-ḥijjah*, 718. (13/2/1319). It was also his abode till his death.
- ◆ He also held the *Mashyakhah* of *dār al-ḥadīth* of al-Zāhiriyyah.
- ◆ He was Imam and teacher of *ḥadīth* in al-Nafīsiyyah School following his Shaykh 'Alam al-Dīn al-Birzālī in 739/1338.
- ◆ He held the *Mashyakhah* of *dār al-ḥadīth* al-Tankaziyyah in 739/1338.

The list above provides a clear indication of the achievements and high scientific status achieved by Imam al-Dhahabī. Hence, it can be concluded that he was highly deserving of the title *shaykh al-muḥaddithīn*, *ḥafīẓ*, and the Imam of *jarḥ & ta'dīl*.

4.3.2 ANALYSIS OF AL-DHAHABĪ'S *TANQIH*

Al-Dhahabī is famed both as a historian and as a *muḥaddith* (tradition expert). However, such recognition of his abilities in these fields does not in any way reduce his expertise in other Islamic sciences nor is it indicative of his lack of mastery over them.

To illustrate, al-Dhahabī was a Master in *qirā'āt*. He was able to master this science at the hands of the most eminent readers of Qur'ān of his time and, later, he even proceeded to teach them. Such marked ability in this field led Ibn al-Jazarī (d. 833/1429), one of the famous scholars of the science of *qirā'at*, to praise him.¹ Moreover, al-Dhahabī was a scholar of *Tawḥīd* and he summarised the book of *Minḥāj al-sunnah al-nabawiyyah fī al-radd 'alā al-Shī'ah wa al-Qadariyyah* written by his colleague Ibn Taymiyyah. In addition, he wrote *al Kabā'ir* and *al-'Ulū li al-'Alī al-Ghaffār*² and others. Al-Dhahabī was also knowledgeable in *fiqh*. In particular, he was well versed in the *fiqh* of the Shafī'ī school and had been taught it by the most famous scholars of his time. These included Kamāl al-Dīn b. al-Zamlakānī, Burhān al-Dīn al-Fazarī and Kamāl al-Dīn b. Qadī Shuhbah.

¹ Ibn al-Jazarī Muḥammad, *Ghāyat al-nihāyah fī asmā' rijāl al-qirā'āt wa al-riwāyah*, 2:71.

² All the above mentioned books are published.

In addition, al-Dhahabī also summarised the *al-Muḥallā* of Ibn Ḥazm, which is one of the main references in the Ṣāḥirī School. In addition, as previously discussed, *al-Taḥqīq* of Ibn al-Jawzī also received due attention from al-Dhahabī. Even though this book is an established part of Ḥanbalī *fiqh*, it is also considered to be a work of comparative *fiqh* as each school of law is represented in it. Over and above this, there is a lot of research, discussions and material related to *fiqh* matters spread amongst al-Dhahabī's other works. Included among these are his jurisprudential choices and preferences, which will be mentioned later.

Consequently, his student, Salāḥ al-Dīn al-Ṣafadī (764/1345) remarked as we have mentioned earlier on al-Dhahabī's marked brilliance:

I have learned from him and read under his direction many of his compilations. I did not find the inactivity of *ḥadīth* experts in his manner nor the dullness of the transmitters. Rather he was shrewd with extensive experience in scholarly sayings.³

However, his persistence to seek *ḥadīth* and the sciences related to it overrode his knowledge of other scientific aspects and he soon became distinguished for this reason.

³ Al-Ṣafadī, *al-Wāḥīfī al-wafayāt*, 2:163.

A. Al-Dhahabī's Methodology In the *Tanqīḥ*

The methodology implemented by al-Dhahabī throughout this book is not specifically referred to or discussed by the author himself. Instead, al-Dhahabī states in the introduction, "This is a *tanqīḥ* of the *Taḥqīq* of Ibn al-Jawzī. I have added to it some useful points." Thus, a noteworthy deduction of this statement is the fact that al-Dhahabī summarized his treatment of Ibn al-Jawzī's work in one word: "*tanqīḥ*". Ibn Manẓūr, in his definition of this word, describes it as follows: "Verifying the speech, he scrutinized the language, and examined it well, or he put it to rights or trimmed it and removed its faults, or defects."⁴

This definition best describes the methodology adopted by al-Dhahabī in his effort to summarize the *Taḥqīq fī masā'il al-khilāf*. He meticulously examined the book of Ibn al-Jawzī, corrected its mistakes, filled in the gaps, further verified that what was correct was correct and that what was weak was weak. Moreover, al-Dhahabī provided a thorough explanation of all areas suffering from vagueness and ambiguity. The method by which such a comprehensive treatment was achieved will be discussed in the following section.

⁴ See Ibn Manẓūr al-Ifriqī, *Lisān al-'Arab*, (نفسح). Lane, *Arabic English Lexicon*, 2: 2836, Islamic Texts Society, 1984.

1. Commentary & Revision of Ibn al-Jawzī's Work

The following examples illustrate the meticulousness of al-Dhahabī's approach in correcting Ibn al-Jawzī's works:

(i.) Ibn al-Jawzī mentions a *ḥadīth* from Hudba, from Ḥammād, from 'Ammār b. Abī 'Ammār that Abū Hurayra said: "The Prophet commanded rinsing out the nose and mouth." Then Ibn al-Jawzī says: "Only Hudba supported it from Ḥammād. Others did not mention Abū Hurayra. But the addition of a trustworthy narrator is acceptable." However, al-Dhahabī did not feel comfortable with the response of Ibn al-Jawzī and went on to say that Ibn al-Jawzī did not deal with this entry in a thorough manner. al-Dhahabī says: "The author became ill-humored (*tanākad*) saying that the addition of a trustworthy narrator in a *ḥadīth* is acceptable"⁵.

(ii.) Ibn al-Jawzī comments that persons of differing opinions reject the evidence of his *madhhab* by weakening the character reference of Jābir al-Ju'fī. But he says, "al-Thawrī and Shu'bah found him to be trustworthy and they were satisfactory referees."⁶ However, al-Dhahabī does not find the statements of these two people

⁵ See al-Dhahabī, *Tanqīh*, p. 8.

⁶ *al-Taḥqīq*, 1:145.

sufficient but says: "Jābir al-Ju'fī is nothing (*laysa bi shay'*)."⁷ Therefore, al-Dhahabī confirmed this man's weakness, which is most of the *muḥaddithīn* are agreed upon.⁸

(iii.) Al-Dhahabī says -after Ibn al-Jawzī has supported his *madhhab* concerning the wiping of the head three times in ablution by several *ḥadīths*- "I [i.e. al-Dhahabī] say: none of them [i.e. the *ḥadīths*] is correct."⁹

(iv.) When al-Dāraqutnī, one of the Imams of the science of *ḥadīth* and the knowledge of *'ilal al-ḥadīth* contested the *ḥadīth* "The ears are part of the head" saying that it was *mursal ḥadīth*, Ibn al-Jawzī comments that "The *raf'* is an addition and the addition from a trustworthy narrator is acceptable." This infuriated al-Dhahabī to the extent that he said: "This is the saying of somebody who has never smelled [i.e. has no idea about] the *'ilal*."¹⁰

(v.) Ibn al-Jawzī mentions the evidence of his *madhhab* regarding the limits of the *'awra* of a man. However, he refrains from mentioning the evidence of his

⁷ Al-Dhahabī, *Tanqīḥ*, p.8.

⁸ See Ibn Ḥajar, *Tahdhīb al-Tahdhīb*, 1:283-286.

⁹ Al-Dhahabī, *Tanqīḥ*, p.9.

opponents. This is unusual as it is contrary to his approach in this book. Hence, al-Dhahabī states, “They [i.e. the opponents] have strong *ḥadīths* that the author does not mention.”¹¹

(vi.) Ibn al-Jawzī mentions a *ḥadīth* from Anas that, “When beginning the prayer, the Prophet used to say *Allah Akbar*, then raise his hands, then say *subḥanaka Allāhumma wa bi ḥamdik* (Glory to Allah and praise be to Him).” Ibn al-Jawzī says that al-Dāraquṭnī reported it, and his men are trustworthy. However, al-Dhahabī notes, “Ibn ‘Adī said al-Ḥusayn used to steal *ḥadīths*. [i.e. was a liar]”¹²

(vii.) In the chapter on *ṣalāt* (mandatory prayer), Ibn al-Jawzī proceeds to say, after he has mentioned some of the supplications to be said in starting prayer:

We agree with our opponents that it is not *sunnah* (recommended) to say all of the aforementioned supplications in the opening of the prayer. In reference to this statement, al-Dhahabī remarks, ‘This is an odd agreement’.¹³

(viii.) Throughout his book, Ibn al-Jawzī strives to defend some *ḥadīths* that he takes both as a proof and as support for his *madhhab*. In response, al-Dhahabī

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¹⁰ Al-Dhahabī, *Tanqīḥ*, p.9.

¹¹ Al-Dhahabī, *Tanqīḥ*, p.27.

¹² Al-Dhahabī, *Tanqīḥ*, p. 29.

remarks that Ibn al-Jawzī exceeded the limits in proving his point, and in addition, failed to be meticulously thorough in his correction of these *ḥadīths*. Al-Dhahabī notes these inaccuracies and comments by saying, “The author has overlooked some of the *ḥadīths*.”¹⁴

(ix.) Once again, al-Dhahabī proceeds to defend al-Daraqutnī when Ibn al-Jawzī ignored his *taḍʿīf* (weakening) of one of the narrators of a *ḥadīth* by saying, “al-Daraqutnī weakened Nāshib as a narrator. However, none have shown disapproval of him except al-Daraqutnī, and the weakening of a narrator cannot be accepted until the reason behind it is explained.” Al-Dhahabī comments:

This indicates both the inclination of Ibn al-Jawzī and his lack of knowledge regarding al-Dāraqutnī. This is because, in fact, al Dāraqutnī only weakened those who were considered extremely weak.¹⁵

(x.) Ibn al-Jawzī says that a *khuṭbah* before the prayer of *istisqāʾ* is not recommended, and he exceeds the limits in interpreting the *ḥadīth* concerning this issue. In particular, Ibn al-Jawzī says, “His saying (prior to the *khuṭba*) means that before he became absorbed with *duʿāʾ*, he called this [i.e. *duʿāʾ*] *khuṭbah*.” In his

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¹³ Al-Dhahabī, *Tanqīh*, p.30.

¹⁴ Al-Dhahabī, *Tanqīh*, p. 33.

assessment of this statement, al-Dhahabī retorts, “I wish that you had remained quiet.”¹⁶

(xi.) Ibn al-Jawzī was gravely mistaken when he weakened one particular trustworthy narrator. This occurred when the author made an error in which he wrongly matched both the narrator’s name and his father’s name with a weaker narrator. Even though the trustworthy narrator and the weak narrator differed significantly in lineage, this did not come to the attention of Ibn al-Jawzī. Ibn al-Jawzī says, “They considered ‘Abd Allah b. Ja‘far a weak narrator.” By way of correcting this error, al-Dhahabī comments, “He is al-Raqqī and he is trustworthy. The one they weakened was al-Madīnī. However, the *ḥadīth* is *munkar* (very weak).”¹⁷

(xii.) Ibn al-Jawzī tries to reject an utterance in a *ḥadīth* on the basis of it being *shādh* (irregular) while al-Dhahabī considers it to be sound and confirmed in other narrations. This is when Ibn al-Jawzī says:

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¹⁵ Al-Dhahabī, *Tanqīh*, p. 36.

¹⁶ Al-Dhahabī, *Tanqīh*, p. 76.

¹⁷ Al-Dhahabī, *Tanqīh*, p. 130.

We said that Mālik, al-Thawrī, Ibn 'Uyaynah, Ḥammād Ibn Zayd, Zā'idah, Wuhayb, al-Darāwardī and Fuḍayl b. Sulaymān narrated it [i.e. that utterance]. All of them narrated the word *zawwajtukahā*. Yet, Abū Ghassān narrated it as *ankaḥnākahā*. However, Ibn Abī Ḥāzim and Ya'qūb al-Iskandarānī narrated it as *mallaktukahā*. Notably, the latter narrators were not *ḥafīẓ*. In addition, it was also narrated by Ma'mar. However, he was known for making many mistakes.

In relation to this statement, al-Dhahabī remarks: 'This is an arbitrary judgement'.¹⁸

(xiii.) With reference to the matter of changing *ḥajj* to 'umrah, al-Dhahabī comments on Ibn al-Jawzī's judgement by observing that

This is an unreasonable combination [between reports] (*jam 'un bārid*) and nothing more than a claim about something that has not happened.¹⁹

(xiv.) Regarding the necessity of continuing a spoiled *ḥajj*, Ibn al-Jawzī mentions some *āthār*. He says, "We narrated this from Ibn 'Umar, 'Aṭā' and Ibrāhīm." al Dhahabī remarks that Dāwūd would not be pushed by those."²⁰

(xv.) With regard to an issue concerning *bay' al-'arāyā*, Ibn al-Jawzī says:

This sort of selling had been allowed only in necessity on the basis of a narration which indicated that a group of people came to the Prophet complaining about their need for *ruṭab* (ripe) dates while they can only exchange for the dried dates they have, so the Prophet allowed them that.

¹⁸ Al-Dhahabī, *Tanqīḥ*, p. 139.

¹⁹ Al-Dhahabī, *Tanqīḥ*, p. 98.

²⁰ Al-Dhahabī, *Tanqīḥ*, p. 101.

However, on examination, al-Dhahabī stated that this is no longer a matter of necessity is established *sharīʿah*.²¹

(xvi.) On the topic of the validity of a slave's gift, Ibn al-Jawzī states that his evidence (of considering it right) was that the Prophet had accepted Barīrah's gift. Al-Dhahabī states that the Prophet only accepted her gift after she had been freed from slavery.²²

(xvii.) Ibn al-Jawzī says that the *ḥadīths* of al-Ḥasan from Samurah were from a book. Al-Dhahabī says it is confirmed that he heard from him. Thus, in accordance with Imam Bukhārī's rules, this entails the narration of al-Ḥasan from Samurah being considered as a continuous chain.

(xviii.) Some *isnāds* (chains of narration) are criticised by Ibn al-Jawzī. An example of such an occasion occurs when the author comments on the *isnād* of a *ḥadīth* saying that it was only Abū Abd al-Raḥīm who narrated it from Zayd and then proceeds to say that Abū Abd al-Raḥīm is considered *ḍaʿīf*. In response to this, al-

²¹ Al-Dhahabī, *Tanqīh*, p. 113.

²² Al-Dhahabī, *Tanqīh*, p. 122.

Dhahabī replies that this is wrong, as the mentioned man was trustworthy and his narration is relied on by Imam Muslim in his *Ṣaḥīḥ*.²³

(xix.) Where Ibn al-Jawzī reports the *mutāba'āt* (text-related appendages) whole with the complete text and chain of transmission, al-Dhahabī only highlights the point of benefit gained from them. An example is *ḥadīth* No.24, where Ibn al-Jawzī reports a text-related appendage by Warqā' to Sufyān al-Thawrī, providing a complete text and chain of transmission through the narration of al-Dāraquṭnī- the point of benefit being to specify the name of one of the narrators, as he is only mentioned by his *kunyah*, Abū 'Azib, in the chain of transmission. Al-Dhahabī only gives a brief summary of all this, saying: ' Warqā' narrated it from Jābir', without citing the chain of transmission of the *ḥadīth* nor its full text. He does the same with regard to the *athar*, No.107.

Sometimes al-Dhahabī leaves out a *ḥadīth* altogether and does not report it, as in the case of the *ḥadīth* of Jābir b. Samurah which reads: "Mā'iz presented himself before the Prophet and acknowledged his sin four times, so the Prophet ordered that he should be stoned."

²³ Al-Dhahabī, *Tanqīḥ*, p. 100.

(xx.) It is customary for Ibn Al-Jawzī to report a *ḥadīth* by ascribing it to a narrator, e.g. Imam Aḥmad. If the *ḥadīth* is authentic (*ṣaḥīḥ*), he then comments after reporting it as follows: “related in the *Ṣaḥīḥayn*”, or “related exclusively in Bukhārī”, i.e. not in Muslim etc. Al-Dhahabī, on the other hand, mentions part of the chain of transmission, then before it he puts a symbol to summarize the commentary used by Ibn al-Jawzī, for example, he puts خ (= KH) to mean ‘related in Bukhārī’ or م،خ (=KH,M) to mean ‘Bukhārī and Muslim’. This is his style of assigning symbols. However, he is sometimes inconsistent, maybe by mistake or for some other reason. For example, Ibn al-Jawzī reports *ḥadīth* No. 140, in the narration of al-Tirmidhī and then comments “al-Tirmidhī says that this is *ṣaḥīḥ* [i.e. an authentic *ḥadīth*]”. Al-Dhahabī, however, does not use any symbol before it, nor does he mention the expression ‘al-Tirmidhī authenticated it’, an expression rarely missed by the scholars of *ḥadīth* as it is quite characteristic of al-Tirmidhī. The same *ḥadīth* is also related in Bukhārī and Muslim but al-Dhahabī fails to indicate that as well. Another example is *ḥadīth* No.48, which Ibn al-Jawzī reports in the narration of Aḥmad and after which he says: “related exclusively in Bukhārī”, but al-Dhahabī neither uses the symbol nor reports verbatim Ibn al-Jawzī’s expression.

(xxi.) Al-Dhahabī sometimes differs from Ibn al-Jawzī, as in *ḥadīth* No.48, which Ibn al-Jawzī reports in the narration of Aḥmad and after which he says: “related in

Bukhārī and Muslim", while al-Dhahabī refers to it with the symbol خ (=KH). The same is true in the case of *ḥadīth* No. 125, which is reported by Ibn al-Jawzī in the narration of Aḥmad and after which he says: "related in Bukhārī and Muslim" whereas al-Dhahabī assigns to it only the symbol م (=M).

2. Al-Dhahabī's Commentary on People Other Than Ibn al-Jawzī

Al-Dhahabī does not only correct the mistakes of Ibn al-Jawzī. In fact, he corrects the errors and oversights of many other scholars. This is due to the fact that al-Dhahabī's approach is one in which he adheres to the truth, neither favouring this person nor that person, particularly if the evidence is patently clear.

For instance, Ibn al-Mundhir discredited the *isnād* of a *ḥadīth*, describing it as *munkar*. However, al-Dhahabī says that the *isnād* is *ṣāliḥ* (acceptable).

Similarly, Ibn Ḥibbān considered that al-Ḥasan al-Baṣrī had not heard any *ḥadīth* from Ibn 'Umar. In response, al-Dhahabī rejects this statement and says that, in fact, al-Ḥasan al-Baṣrī declared that he had spoken orally with him. This has been reported with a strong *isnād*.²⁴

²⁴ Al-Dhahabī, *Tanqīḥ*, p. 145.

Ibn al-Jawzī considers *ish'ār* (branding an animal) to be *makrūh* (disliked). Ibn al-Jawzī depends in this judgement on what was narrated by Ibrāhīm al-Nakha'ī who said, "*ish'ār* is *muthlah* (mutilation)." Al-Dhahabī disagreed with this. In apology to al-Nakha'ī, al-Dhahabī says: "The *ḥadīth* about its acceptability never reached al-Nakha'ī."²⁵

3. Commitment To The Wordings Of The Original

A. Mentioning The Narrators

Al-Dhahabī does not always mention the personal names of the narrators in the *sanad* of the *ḥadīths*, whereas Ibn al-Jawzī did. This was not without reason. For example, al-Dhahabī sometimes gives the *kunyah* of narrators where Ibn al-Jawzī has given their personal names, and vice versa. By way of demonstration, some instances in which this has occurred follow:

- (i.) Abū Bakr al-Naysābūrī, the *shaykh* of al-Dāraqūṭnī, is mentioned by al-Dāraqūṭnī in his *Sunan* in that way. Ibn al-Jawzī also does the same, while al-Dhahabī refers to him as Ibn Ziyād, thus, giving him the lineage of his grandfather.²⁶

²⁵ Al-Dhahabī, *Tanqīh*, p. 107.

²⁶ Al-Dhahabī, *Tanqīh*, p. 5.

(ii.) Ibn al-Jawzī mentions the name Sulaymān b. ‘Abd al-Raḥmān while al Dhahabī refers to him as Sulaymān b. bint Shuraḥbīl.²⁷

(iii.) Ibn al-Jawzī says regarding the *sanad* of a *ḥadīth* mentioned by al-Tirmidhī, that Naṣr b. ‘Alī related from Shujā‘ b. al-Walīd. However, in his *Tanqīh* al-Dhahabī says: “Naṣr b. ‘Alī related from Abū Badr”.²⁸ This was because there were two narrators called Shujā‘ b. al-Walīd. One of them was *ṣadūq* while the other was only *maqbūl*.²⁹

(iv.) Ibn al-Jawzī says in his narration of the *isnād* of Imam Aḥmad, “Sufyān related...”, while in his *Tanqīh* al-Dhahabī says: “Ibn ‘Uyaynah related...”³⁰ This is because there were two Sufyāns: Sufyan al-Thawrī and Sufyān b. ‘Uyaynah.

(v.) Ibn al-Jawzī once mentions Sufyān in an *isnād* of a *ḥadīth* without clarifying which one he meant, whereas al-Dhahabī specifies “al-Thawrī” instead.³¹

²⁷ Al-Dhahabī, *Tanqīh*, p. 5.

²⁸ Al-Dhahabī, *Tanqīh*, p. 19.

²⁹ See Ibn Ḥajar, *Tahdhīb al-Tahdhīb*, 2:153-154.

³⁰ Al-Dhahabī, *Tanqīh*, p. 22.

³¹ Al-Dhahabī, *Tanqīh*, p. 26.

B. Choice Of Phrases

When summarising the books of previous scholars, al-Dhahabī was not strict in using the wordings of the original book. This was due to the fact that he was not concerned about the wording of the book as such but was, in fact, more committed to extracting and conveying the meaning in the most comprehensive manner. When necessary, al-Dhahabī altered the wording of the original phrase. In particular, al-Dhahabī employed this technique when he found the original wording imprecise or if he felt there was a more appropriate word to be had. For example, Ibn al-Jawzī writes in the *Taḥqīq*, “They [i.e. Bukhārī and Muslim] relate it in the two *Ṣaḥīḥs*. It provides no evidence because it was washed because it was dirty.” This phrase was in reference to the washing of semen from the dress of the Prophet. Al-Dhahabī, however, did not find the wording appropriate. Instead, he replaces the phrase with, “it was washed in order to clean it”.³²

C. Explanation Of Terms

Throughout his summary of Ibn al-Jawzī's work, al-Dhahabī provides explanations of various *ḥadīth* terms. For instance, he comments in reference to Ibn al-Jawzī's remark, “They mentioned a *ḥadīth* which has no basis (*lā aṣla lahu*)”. Al-Dhahabī says: “They mentioned [a *ḥadīth*] without a *sanad*: “The best of your vinegar is the

vinegar of your *khamr*”.³³ By way of clarification, he says that the meaning of the term *lā aṣḥa lahu* is that it has no *sanad*. This is a worthy observation rarely mentioned in the books of *ḥadīth* terminology.

He also records other transmissions from either the same Successor (*mutāba‘āt*) or Companion (*shawāhid*) not reported or referred to by Ibn al-Jawzī:

One of the useful features of this abridgment is that he adds some verification of chains of transmission of certain *ḥadīths* when needed. For example, when Ibn al-Jawzī reports the *ḥadīth* of Umm al-Faḍl, who said,

“ I came to the Prophet and I said to him: I saw in a dream that in my home, or in my lap, there was one of your limbs...”³⁴ etc, al-Dhahabī says: “A similar *ḥadīth* was reported by Abū Dāwūd via Abū al-Aḥwaṣ, from Simāk, from Qābūs b. Abī al-Mukhāriq, from Umm al-Faḍl. There is another narration, from ‘Alī b. Ṣāliḥ, from Simāk.”³⁵

So, al-Dhahabī adds a transmission from a different Successor and a transmission from a different Companion to strengthen the authenticity of the *ḥadīth*.

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³² Al-Dhahabī, *Tanqīḥ*, p. 6.

³³ Al-Dhahabī, *Tanqīḥ*, p. 6.

³⁴ See the complete text in Aḥmad’s *Musnad*, 6:339-340.

³⁵ See page 6. The *ḥadīth* mentioned above is related by Abū Dāwūd no. 375; Ibn Mājah no.522.

D. Explaining Difficult Words in the *Ḥadīth*

Sometimes al-Dhahabī explains difficult words in the *ḥadīth* as he does in the *ḥadīth* “This gold is worthless, not even worth a *kharbaṣīṣah*.” Explaining the meaning of *kharbaṣīṣah*, he says: “it is trifling jewelry”.³⁶ With regard to the *ḥadīth* which says: “The eyes are the string with which *al-sah* is tightly closed”, al-Dhahabī says: “*al-sah* means the ring of the anus.”³⁷

4. AL-DHAHABĪ'S *FIQH* CHOICES

Another useful feature of this book is that it highlights one of the not so well known aspects of al-Dhahabī's personality which is often neglected by his biographers, and that is the *fiqh* aspect in his training as a scholar. A close look at al-Dhahabī's opinions and *fiqh* discussions in this book shows quite evidently that he was one of the scholars of *ḥadīth* who were also well versed in *fiqh*. He detested disapproved fanaticism, revered the speech of the Messenger and followed faithfully in the footsteps of the great Imams before him who always asserted that everybody's speech is subject to being accepted or rejected except the Prophet's. The following are examples to illustrate al-Dhahabī's impartiality and integrity:

³⁶ See Folio 6/A. also: al-Fayrūzābādī Muḥammad b. Ya'qūb (817/1414), *al-Qāmūs al-muḥīṭ*, p. 616.

³⁷ Folio 7/A; also: al-Fayrūzābādī, *al-Qāmūs al-muḥīṭ*, p. 1246.

(i.) Regarding the question of whether or not the leftovers of the food or drink of a cat is impure and whether or not one should wash a vessel if a cat comes into contact with it. Al-Dhahabī says after reviewing the arguments of both parties and the *ḥadīths* used in support of these arguments: “I say: it is possible to reconcile between the various *ḥadīths* by saying that washing is *mandūb* (i.e. recommended).³⁸

(ii.) Regarding the question of performing supererogatory prayers before the *‘īd* prayer, al-Dhahabī disagrees with Ibn al-Jawzī’s opinion that it is not a traditional practice of the Prophet to perform supererogatory prayers either before the *‘īd* prayer or after it. Al-Dhahabī says: “I say: the text relates specifically to the Imam (i.e. the person who leads the prayer). As for the *ma’ mūm* (i.e. one who is led in prayer), it is permissible for him to perform supererogatory prayers if he wishes.³⁹

(iii.) Regarding the question of paying *zakāʾ* at the end of Ramaḍān at least one or two days before the *‘īd*, al-Dhahabī says about the evidence advanced by Ibn al-Jawzī: “It is not valid, or it is evidence for the others”⁴⁰

³⁸ Folio 11/A.

³⁹ Al-Dhahabī, *Tanqīḥ*, p. 4.

⁴⁰ Al-Dhahabī, *Tanqīḥ*, p.65.

(iv.) Regarding the question of making the intention to fast Ramaḍān during daytime, Ibn al-Jawzī holds the opinion that it is not valid. However, other scholars say that it is valid, relying on the *ḥadīth* related by Salamah b. al-Akwa': "Once the Prophet ordered a person on the day of 'Āshūrā' (i.e. the tenth of Muḥarram) to announce: 'Whoever has eaten should not eat anymore, but fast. And who has not eaten should not eat but complete his fast.'"⁴¹ Ibn al-Jawzī replies that fasting the day of 'Āshūrā' is only recommended, and so it is not equal to fasting Ramaḍān. Ibn al-Jawzī argues using the *ḥadīth* of Mu'āwiyah: "People of Madīnah! Where are your learned men? I heard the Messenger of Allah say about this day: 'This is the day of 'Āshūrā', and fasting it is not prescribed for you . . .'"⁴² Al-Dhahabī says: "This (i.e. the *ḥadīth* narrated by Mu'āwiyah) was heard by Mu'āwiyah on the 9th or 10th year after the *Hijrah*, after the fasting of 'Āshūrā' had been abrogated, so this evidence does not prove that it (i.e. fasting the day of 'Āshūrā') has never been prescribed."⁴³

⁴¹ It was related by Bukhārī no. 1924 p.150.

⁴² See Imam Mālik, *al-Muwaṭṭa'*, translated by Bewley A., p.116. Also, al-Bukhārī no. 2003 p.156.

⁴³ Al-Dhahabī, *Tanqīh*, p. 83.

(v.) Regarding the question of “shading the *maḥmil* (seat) during *iḥrām*”,⁴⁴ Ibn al-Jawzī says: “He was shaded” could mean he was shielded at an angle from the side of the sun. To this, al-Dhahabī says: This meaning can not be right, as this shading of the Prophet took place immediately after the sun had passed the meridian during the summer, which means that it was right above their heads. Therefore, the shading must have been right above his head.”

(vi.) Regarding the question of whether there is a compensation for cutting a tree in the *Ḥaram* of Mecca, Ibn al-Jawzī says that there is compensation. He argues using the *ḥadīth*: “...Its (i.e. Mecca's) trees are not to be cut nor its game to be frightened.”⁴⁵ al-Dhahabī says: “No compensation is mentioned (i.e. for cutting a tree in the *Ḥaram*), and the same is true for frightening game: there is no compensation for it.”⁴⁶

(vii.) Al-Dhahabī also scrutinises the Ḥanafī School of law regarding the question of whether it is enough for a pilgrim to shave part of his head to get out of the state of *iḥrām*. Abū Ḥanīfah says that the amount of the head that is enough to shave

⁴⁴ *Maḥmil* is a sedan chair, or a camel litter. See Hans Wehr, *A dictionary of Modern Written Arabic*, p. 207, also al-Ba‘lī Muḥammad b. Abī al-Faṭḥ (d.709/1309), *al-Mawḍi‘ ‘alā abwāb al-Muqni‘*, p.171.

⁴⁵ This is a part of a *ḥadīth* which, was related by al-Bukhārī no. 1833 p. 144.

should be the same as the part that is enough to wipe during ablution. Al-Dhahabī says: "Shaving part of the head only is prohibited."⁴⁷

(viii.) Regarding the question of *shuf'ah* (i.e. preemption by neighbourhood or the right of purchasing before others), Ibn al-Jawzī says: 'Then the *ḥadīths* should be understood to refer to the partner [in a business or land] who could be referred to as *neighbour*.' Al-Dhahabī says: the expression 'the neighbour has priority' does not necessarily mean this priority is an obligation, rather, it *mustaḥabb* (desirable).⁴⁸

(ix.) Regarding the question of whether it is permissible to take wages for performing pious acts, al-Dhahabī says after reporting Ibn al-Jawzī's discussion of those who think it is permissible: "We should pay attention to the general meaning of the *ḥadīth* of the Prophet, not to the specific reason of why it was said, for the Prophet said: "Verily, the best thing to take wages for is the book of Allah."⁴⁹

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⁴⁶ Al-Dhahabī, *Tanqīḥ*, p. 101.

⁴⁷ Al-Dhahabī, *Tanqīḥ*, p.106. Al-Dhahabī indicates to the *ḥadīth* related by Bukhārī and Muslim from Ibn 'Umar that the Prophet forbade *qaza*. See *al-Lu'lu' wa al-marjān fī mā ittafaq 'alayhi al-shaykhān*, 2:210. The meaning of *qaza* is shaving one's head and leaving the forelock or other tuft of hair here and there.

⁴⁸ Al-Dhahabī, *Tanqīḥ*, p.124.

⁴⁹ Al-Dhahabī, *Tanqīḥ*, p. 125.

(x.) Regarding the question of the necessity to be just when giving gifts to one's children, Ibn Al-Jawzī reports the evidence of his opponents. al-Dhahabī says: ' This does not seem to contradict what has been said.'⁵⁰

(xi.) Ibn al-Jawzī says: " The *wāw* (i.e. the conjunction *wa* "and" does not necessarily mean the elements joined with *wa* should be taken in that order. Al-Dhahabī says: ' If it was meant to indicate the logical ordering of things, then *kaffārah* (expiation) should have come first. The *wa* is rather for *jam* ' (addition). Whoever thinks it is for ordering he has missed what the *wa* actually means and he needs to justify his choice.'⁵¹

5. REMARKS ABOUT AL-DHAHABĪ'S WORK

(i.) Al-Dhahabī sometimes takes the liberty, when narrating a *ḥadīth*, to abridge it, as if he is only narrating its meaning. This could do disservice to the *ḥadīth* sometimes. For example, about the *ḥadīth*:

Mālik narrated from Nāfi' from Ibn 'Umar about the one who has forgotten a prayer then remembers it when praying behind the Imam.' He said: ' He should make up the prayer he forgot, and then repeat the one he prayed behind the Imam.' (*mawqūf*)⁵².

⁵⁰ Al-Dhahabī, *Tanqīh*, p.124.

⁵¹ Al-Dhahabī, *Tanqīh*, p.129.

⁵² Al-Dhahabī, *Tanqīh*, p. 60

The complete wording of Mālik, on the other hand, is:

Mālik from Nāfi' that 'Abd Allah b. 'Umar used to say: 'Someone who only remembers that he has forgotten a prayer when he is praying the next prayer behind an Imam, should pray the prayer he has forgotten after the Imam has said the *taslīm* and then pray the other one again.⁵³

(ii.) Al-Dhahabī reports the following *ḥadīth*:

Mālik, from Ḍamrah b. Sa'īd from 'Ubayd Allah b. 'Abd Allah b. 'Utbah b. Mas'ūd that al-Ḍaḥḥāk b. Qays asked al-Nu'mān b. Bashīr: "What did the Messenger of Allah, may Allah bless him and grant him peace, used to recite on Friday [i.e. prayer] after *Sūrat al-Jumu'ah*? He said: *Hal atāka ḥadīth al-Ghāshiyah*."⁵⁴

Al-Dhahabī assigns his symbol (م، خ) to note that it is related by al-Bukhārī and

Muslim, whereas in fact it is related by Muslim only.⁵⁵

6. SOME OF AL-DHAHABĪ'S SOURCES

Part of the nature of abridged books is that they do not add any new sources to those used by the originals. In fact some of the original sources may be left out, due to the requirements of the process of abridgement. However, al-Dhahabī added to his book

⁵³ See *al-Muwatta'* trans. A. Bewley, 9.23 *How to Do the Prayer in General*, No. 72 p. 62. It is also related by al-Dāraqutnī, *al-Sunan*:1:421, with the wording: "If one of you forgets his prayer, and only remembers it when he is standing behind the Imam, then let him pray with the Imam and, when he finishes with the Imam, let him perform the prayer which he forgot, then let him repeat the prayer he prayed with the Imam".

⁵⁴ See *al-Muwatta'* trans. A. Bewley, 5.9 *The Recitation in Jumu'ah Prayer*, No. 21 p. 40.

⁵⁵ See Muslim, chapter: what is to be read in Jumu'ah prayer, No.878 p.418.

a number of important sources which increases the scholarly value of his *Tanqih*.

The following are some of these sources:

(i.) **The *Musnad* of Baqī b. Makhlad al-Andalusī** (d.276/889): This is a missing source, although it is a voluminous book of *ḥadīth* comprising a large number of Prophetic *ḥadīths*. Al-Dhahabī verifies the various narrations of the *ḥadīth* of Abū Hurayrah: “Whoever bathes a dead person, he should himself make *ghusl* and whoever carries a dead person, he should make ablution.” He says: “These various narrations are all in the *Musnad* of Baqī b. Makhlad.”⁵⁶ Al-Dhahabī declares in his *Siyar* that he had two volumes of this *Musnad*.⁵⁷

(ii.) **The *Maghāzī* of Sa‘īd b. Yaḥyā al-Umawī** (d.249/863): This book is one of the most important sources for *sīrah*.⁵⁸ It is also one of the still missing sources.⁵⁹

7. SOME TERMS SPECIFIC TO AL-DHAHABĪ

◆ ***Ṭayr gharīb*** (a strange bird): He uses this expression referring to ‘Abd Allah b. Muḥammad al-Balawī.⁶⁰

⁵⁶ Al-Dhahabī, *Tanqīh*, p.15.

⁵⁷ See Al-Dhahabī, *Siyar a‘lām al-nubalā’*, 13:294.

⁵⁸ See: Fārūq Ḥamādaḥ, *Maṣādir al-sīrah al-nabawiyyah*, p. 65-66.

⁵⁹ Al-Dhahabī, *Tanqīh*, p. 21.

This phrase, on first consideration, indicates that the person is unknown. However, al-Dhahabī himself quotes al-Dāraquṭnī's saying that al-Balawī fabricated *ḥadīths*.⁶¹

♦ *Majma' al-ḥasharāt* (a gathering point of insects): al-Dhahabī uses this phrase with reference to al-Dāraquṭnī's *Sunan*.⁶²

This, in my opinion, might be because the book is full of unknown and unreliable narrators.

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⁶⁰ Al-Dhahabī, *Tanqīḥ*, p. 53.

⁶¹ See : al-Dhahabī, *Mẓān al-i'tidāl*, 3:205.

⁶² Al-Dhahabī, *Tanqīḥ*, p. 57.

CHAPTER 5: SECTION ON CRIME (*AL-JINĀYĀT*)

Since the subject of the book is disputed issues, the author does not discuss retaliatory punishment (*qiṣāṣ*) from the viewpoint of its legality because this issue is a subject of consensus amongst Muslims. There is an issue here which I would like to highlight due to the amount of neglect it is shown by those who write on the subject of Islamic law or those who call to Islam. That issue is that these writers and authors do not distinguish between that which is established in the *sharī'a*, and is the subject of consensus amongst the '*ulamā*' of the Islāmic community, and which, if departed from, is considered a departure from the *sharī'a* and a defection from Islām, including the issues of the statutory punishments (*ḥudūd*), usury, intoxicants, polygamy, the veil for women, striving in the way of Allah, and other issues which are agreed upon, and between those issues in which the views of the '*ulamā*' differ based upon the difference of the evidences for them, such as killing a Muslim for killing a *dhimmī*, or a freeman for a slave, and the many other issues which the '*ulamā*' have dealt with in their books both ancient and modern, including al-Dhahabī.

Those issues upon which there is consensus and which are established in the religion should be complied with, submitted to, and believed in by a Muslim, and the way in which he calls people to them should be to make it known that they are from Allah. It will not be in vain to put forward these issues to someone whether they believe that they are from Allah or not. If the person believes that they are from Allah then there

is no way that he would object to them. If the person is not a believer then it is necessary to call that person to belief in Allah and to explain that clearly to him. Then, if he believes, there is no harm in explaining the wisdom of the divine lawmaking after that. However, explaining the wisdom at the beginning or relying solely upon it has certain drawbacks amongst which is the fact that the wisdom behind every divine judgement has not been made clear to us; also, various intellects may differ in understanding these judgements. For example, regarding retaliatory killing (*qiṣāṣ*) for the murderer, a group of philosophers and social scientists such as Rousseau and Bentham have said that it is a cruel and unjust punishment, and that an innocent person may be punished wrongly, and that there is no evidence that it reduces crime, and that the society or state has no right to order that life be taken away from individuals, etc. What I mean is that reliance upon individual discernment, viewpoint and intellect alone instead of the divine law is not satisfactory as a method of reasoning or to reach absolute truths whereas the divine law or *sharī'a* is from the One who is Omniscient and All-Aware of what He has created. Allah says: "Does He who created not then know?"¹ and He says: "Do you know better or does Allah?"² and He has said: "Do they then seek the judgement of the Time of Ignorance? Who could be better at giving judgement than Allah for

¹ *al-Mulk*: 67:14

² *al-Baqarah* 2:139.

people with certainty?"³. Therefore, every law other than the law of Allah is the law of the Age of Ignorance in its full meaning of ignorance, backwardness, reactionism, and injustice. As the Qur'ān indicates, in retaliation there is the very life of society and its peace and stability. Neglecting it leads to the corruption of society and the spread of killing for the most flimsy of reasons, as can be seen today in many countries which subsequently undertake to look after those murderers and spend on them out of the public purse, including the relatives of the victim who pay through taxes. This is the height of ignorance and injustice. The divine laws have agreed upon the necessity of retaliation and healthy human nature and intellect also call for it. Hence we find many non-Muslim thinkers demanding this just law for their own countries.⁴

[Issue 1] A Muslim is not killed for killing a non-believer

Abū Ḥanīfah says: He is to be killed for killing a *dhimmī*

The *ḥadīth* evidence:

- [1] **Muṭarrif relates from al-Sha'bī, from Abū Juḥayfah: "I asked 'Alī: 'Have you anything from the Messenger of Allah after the Qur'ān?' He said: 'No**

³ *al-Mā'idah* 5: 50.

by Allah, except a God-given understanding of the Qur'ān, and what is on this paper.' I asked: 'And what is on this paper?' He answered: 'Blood money, freeing a prisoner of war, and the principle that a Muslim is not to be killed for killing a non-believer.'⁵

- [2] Aḥmad, from Yahya, from Ibn Abī 'Arūba, from Qatāda, from al-Ḥasan, from Qays b. 'Ubād: "I and al-Ashtar went to 'Alī and said to him: 'Did the Prophet of Allah entrust you with anything that he did not entrust to the people as a whole? He said: 'No, except what is in this document here.' And written on the scabbard of his sword were the words: 'The blood of Muslims is equal. They are as one against others, and their protection is sought by the lowliest amongst them. A Muslim is not killed for killing a non-believer, nor for one who has made a treaty.'⁶

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⁴ See for example: Dr. Charles E. Rice, a professor at Notre Dame Law School, U.S.A. *The Death Penalty Dilemma* and John F. McManus, *Surgical Effect of Death Penalty*.

⁵ *ṣaḥīḥ*. It is related by Aḥmad, *al-Musnad*, ed. Aḥmad Shākir 2:35 no. 599; al-Bukhārī, *al-Jāmi' al-ṣaḥīḥ*, 3047 p.245; al-Tirmidhī 1412 p.1794; al-Nasā'ī, 4748 p.2395; Ibn Mājah 2658 p.2637; al-Bayhaqī, *al-Sunan al-kubrā* 4:220; Ibn al-Jārūd 'Abd Allah b. 'Alī, *al-Muntaqā*, 794 p.268; al-Ḥumaydī 'Abd Allah b. al-Zubayr, *al-Musnad*, 1:23 no. 40; al-Ṭabarānī Sulaymān b. Aḥmad, *al-Mu'jam al-Awṣaṭ*, 3:91 no. 2181, all from al-Sha'bī, from Abū Juḥayfah, from 'Alī.

⁶ *ṣaḥīḥ*. It is related by Aḥmad 1:123 no. 993; Abū Dāwūd 4530 p.1556; al-Nasā'ī, 4738 p.2394, al-Bayhaqī, *al-Sunan al-kubrā*, 8:29, all from Qatāda, from al-Ḥasan al-Baṣrī, from Qays b. 'Ubād, from

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- [3] Muḥammad b. Rāshid relates from Sulaymān b. Mūsā, from 'Amr b. Shu'ayb, from his father that his grandfather said: "The Prophet ruled that a Muslim is not killed for killing a non-believer."⁷
- [4] Ibrāhīm b. Ṭahmān relates from 'Abd al-'Azīz b. Rufay' from 'Ubayd b. 'Umayr from 'Ā'ishah from the Messenger of Allah: "The killing of a Muslim is not allowed except in one of three circumstances: A fornicator who is married, who should be stoned, a man who kills a Muslim deliberately, and a man who leaves Islam and subsequently declares war on Allah and His Messenger, who should be either killed, crucified or banished from the land."⁸

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'Ali. The *ḥadīth* is *ṣaḥīḥ*, although both al-Ḥasan and Qatāda were *mudallis* as it is a second transmission for the previous one.

⁷ *ṣaḥīḥ*. It is related by Aḥmad 2:178, 180, 192; al-Tirmidhī 1413 p.1794; Abū Dāwūd 4506 p. 1553; Ibn Abī Shaybah Abū Bakr 'Abd Allah b. Muḥammad, *al-Muṣannaf*, 5:409 no. 27463; al-Dāraquṭnī 3:133-134.

⁸ *ṣaḥīḥ*. It is related by al-Nasā'ī, *al-Sunan al-kubrā*, 4:219-220 no. 6945; Abū Dāwūd 4353 p.1540; al-Dāraquṭnī 3:81, all from 'Ubayd b. 'Umayr from 'Ā'ishah. There are two other narrators from 'Ā'ishah:

(i) al-Aswad b. Yazīd al-Nakha'ī who was mentioned by Aḥmad 6:181; Muslim 1676 p.974; al-Dāraquṭnī 3:82.

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They [i.e. Ḥanafīs] argue using the *ḥadīth*:

- [5] ‘Ammār b. Maṭar relates from Ibrāhīm b. Abī Yaḥyā, from Rabī‘ah from Ibn al-Baylamānī from Ibn ‘Umar: “The Messenger of Allah killed a Muslim for killing a Covenanter.”⁹

al-Dāraqūṭnī said: “Only Ibrāhīm supports this and he is *matrūk*; the correct version is *mursal*, and Ibn al-Baylamānī is *ḍa‘īf*.”

‘Abd al-Raḥmān b. Ziyād said¹⁰: “I said: ‘Your scholars say: ‘We reject carrying out the *ḥudūd* punishments in areas of doubt.’ But you have arrived at

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(ii) ‘Amr b. Ghālib al-Hamdānī al-Kūfī who was mentioned also, by Aḥmad 6:214; al-Nasā’ī 4022 p.2351; al-Ṭayālīsī Abū Dāwūd Sulaymān b. Dāwūd, *al-Musnad*, 1543 p.216; Ibn Abī Shaybah Abū Bakr ‘Abd Allah b. Muḥammad, *al-Muṣannaḥ*, 5:451 no. 27893. The *ḥadīth* was also, related by other companions:

(a) ‘Abd Allah b. Mas‘ūd: al-Bukhārī; *al-jāmi‘ al-ṣaḥīḥ*, 6878 p. 573; Muslim 1676 p. 974; Abū Dāwūd 4352 p. 1540, al-Nasā’ī 4021 p. 2350.

(b) ‘Uthmān b. ‘Affān: Aḥmad 437 1:62; al-Nasā’ī 4053 p. 2353.

⁹ *ḍa‘īf*. It is related by al-Dāraqūṭnī 3:134-135; Ibn Abī Shaybah Abū Bakr ‘Abd Allah b. Muḥammad, *al-Muṣannaḥ*, 5:407 no. 27451; ‘Abd al-Razzāq al-Ṣan‘ānī, *al-Muṣannaḥ*, 10:101 no. 18514; Abū Dāwūd, *al-Marāṣil*, 250 p. 207, al-Bayhaqī, *al-Sunan al-kubrā* 8:30. See also, al-Zayla‘ī ‘Abd Allah b. Yusuf, *Naṣb al-rāyāh fī takhrīj al-ḥadīth al-Hidāyah*, 4:335-336; and Ibn Ḥajar al-‘Asqalānī, *Fatḥ al-Bārī*, 12:262.

¹⁰ This is as it is in the manuscript. There are some words missing in the text. The complete text is: “‘Abd al-Raḥmān b. Maḥdī related that ‘Abd al-Wāḥid b. Ziyād said: ‘I said to Zufar [i.e. Ibn al-Hudhayl, one of Abū Ḥanīfah’s senior students died 158/774]...” See the complete text in al-Bayhaqī, *Ma‘rifat al-sunan wa al-āthār*, 6:153; *al-Sunan al-kubrā*, 8:31; al-Dhahabī, the *Siyar*, 8:40;

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a great area of doubt and have the audacity to carry out the *ḥadd* punishment.' He said: 'And what would that be?' I said: 'Killing a Muslim for a non-believer.' He said: 'Then be witness that I renounce this.'

It has been mentioned that the person that the Messenger of Allah killed for killing a Covenanter was 'Amr b. 'Umayyah al-Ḍamrī. However 'Amr lived for two years after the death of the Prophet.

It is also said that 'Alī killed a Muslim for killing a non-believer. We say that the *ḥadīth* does not support this.

- [6] Al-Dāraquṭnī narrates from Ibn 'Uqdah from Muḥammad b. Aḥmad b. al-Ḥasan from Muḥammad b. 'Udays from Yūnus b. Arqam from Shu'bah from al-Ḥakam from Ḥusayn b. Maymūn from Abū al-Janūb: 'Alī said: "Whoever has from us a covenant of protection then his blood is as our blood."¹¹

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Ibn Ḥajar, *Fatḥ al-Bārī*, 12:262. Al-Dhahabī comments : "This is how the scholar should be complying with the Text." Ibn Ḥajar authenticied the *isnād*.

¹¹ *ḍa'īf*. It is related by al-Dāraquṭnī 3:147-148; al-Bayhaqī, *al-Sunan al-kubrā* 8:34 with an addition: "A Muslim who killed a *dhimmī* was brought to 'Alī b. Abī Ṭālib. The man proved to be guilty of man-slaughter. 'Alī ordered that he is to be killed. However, the murdered's brother came and said that he barduned the murderer. 'Alī said: They might threatened you or frightened you. The answered: No,

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Abū al-Janūb is *ḍa'if*. We would also dispute that the blood of a *dhimmī* is *muḥarram* like our blood.

Scholars have differed in the issue of carrying out retaliation upon a Muslim who has killed a non-believer (*kāfir*) as the author has mentioned. The argument of the majority is that Allah Almighty has directed the speech in the Qur'ān at the Believers on the basis of His words: "...But if someone is absolved by his brother..."¹² and brotherhood being based on belief since Allah says, "The *mu'minūn* are brothers,"¹³ so there is no brotherhood between a believer [i.e. Muslim] and a non-believer [i.e. *kāfir*]. Furthermore, the *ḥadīths* found on this issue are authentic and clear in opposition to the evidences of the others which are weak.¹⁴ A *kāfir* may either be under a treaty or under a state of war. If he is under a state of war then his blood is not protected. If he is under a treaty then his blood is protected because of the treaty, and whoever attacks him has attacked one of Allah's sacred things. Retaliation has been prohibited against a Muslim for his killing a *dhimmī* due to the inequality of the

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but killing him will not bring my brother back to life. In addition, they compensated me and I agreed. Hence, 'Alī said: You know best. whoever ...etc.

¹² *al-Baqarah* 2:177.

¹³ *Al-Ḥujurāt* 49:10.

¹⁴ See the following *ḥadīths* no. 1-6.

Muslim and the *kāfir* in the area of faith which protects the faithful person's blood. A Muslim's blood is not permitted except in three cases, as in the *ḥadīth*: "Adultery after marriage, murder, and apostasy."¹⁵ The word "murder" here encompasses Muslims and non-Muslims alike but the authentic *ḥadīth* limits it to a Muslim whose blood is protected.¹⁶ Therefore, if a *dhimmī* kills a Muslim and the Muslim was an adulterer who had been married then the *dhimmī* would not be killed because the blood of the Muslim in this case is not protected. Mālik says that if a Muslim kills a *dhimmī* by *ghīlah*¹⁷ (treachery), then, in this case, the Muslim is killed for his killing the *dhimmī*. However, Aḥmad, in one report from him, says that the Muslim, if he kills a *dhimmī* deliberately, will have the amount of blood money doubled, because of what has been authentically reported from 'Uthmān b. 'Affān that a man once killed a *dhimmī* and he was taken to 'Uthmān who did not kill him but fined him 1000 dīnārs. The majority say that a Muslim is not to be killed for killing a *kāfir* whether he be a *dhimmī* or not and that only blood money is due from him. This is

¹⁵ This is part of a *ḥadīth* related by al-Bukhārī; *al-jāmi' al-ṣaḥīḥ*, 6878 p. 573; Muslim 1676 p. 974; Abū Dāwūd 4352 p. 1540, al-Nasā'ī 4021 p. 2350. See also *ḥadīth* no. 4, and *al-Lu'lu' wa al-marjān*, trans. M. M. Khan 2:69.

¹⁶ See *ḥadīth* no. 1.

¹⁷ The meaning of *ghīlah* is to kill someone either for his wealth or his wife. It can be also killing someone by trickery so that one deceives another in order to enter somewhere and take what he has. According to Imām Mālik view, there is no way to forgiveness in this case, for the victim or his

the most likely due to the strength of the evidence, both textual and intellectual, and Allah knows best¹⁸.

[Issue 2] A freeman is not killed for killing a slave

Abū Ḥanīfah says: He should be killed if he has killed another's slave.

Dāwūd said: He should be killed if he has killed his own slave.

The *ḥadīth* evidence:

- [7] al-Dāraquṭnī, from 'Uthmān al-Burrī, from Juwaybir, from al-Ḍaḥḥāk from Ibn 'Abbās that the Prophet said: "A freeman is not killed for killing a slave."¹⁹

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family or the Imam because it is Allāh's right. See, Ibn Farḥūn Ibrāhīm b. 'Alī, *Tabṣirat al-ḥukkām*, 2:272 and Ibn Qudāmah, *al-Mughnī*, 11:460.

¹⁸ See: al-Bayhaqī, *Ma'rifat al-sunan wa al-āthār*, 6:266; and Ibn Qudāmah, *al-Mughnī*, 11:465, 12:54; Ibn al-'Arabī Abū Bakr Muḥammad b. 'Abd Allāh, *al-Jāmi' li-Aḥkām al-Qur'ān*, 1:61.

¹⁹ *ḍa'īf jiddan*. (The chain is very weak.) It is related by al-Dāraquṭnī 3:133; al-Bayhaqī, *al-Sunan al-kubrā* 8:35. There are three faults in the *isnād*:

- (i) Abū Salamah 'Uthmān b. Miqṣam al-Burrī al-Kindī al-Baṣrī who is *matrūk*, al-Jūzajānī said: he was a liar. See: al-Dhahabī, *Mẓān al-'itidāl* 3:453.
- (ii) Juwaybir b. Sa'īd al-Azdī al-Balkhī al-Kūfī, the narrator of *al-Taḥfīf* from al-Ḍaḥḥāk, died after (140/757) was described by Ibn Ḥajar and others as an unreliable narrator. See Ibn Ḥajar al-'Asqalānī, *Taqrīb al-Tahdhīb*, p. 205.
- (iii) There is a disconnection in the *isnād* as al-Ḍaḥḥāk never heard from Ibn 'Abbās.

- [8] **Isrā'īl** relates from **Jābir al-Ju'fī** from **'Āmir** that **'Alī** said: **"It is part of the *sunnah* that a Muslim is not killed for killing a non-believer nor a freeman for a slave."**²⁰
- [9] **Ismā'īl b. 'Ayyāsh** relates from **al-Awzā'ī** from **'Amr b. Shu'ayb** from his father from his grandfather: **"A man killed his slave deliberately so the Prophet flogged him one hundred stripes and banished him for a year and ordered him to free a slave."**²¹

²⁰ *ḍa'īf*. It is related by al-Dāraquṭnī 3:133-134; al-Bayhaqī, *al-Sunan al-kubrā*, 8:34. In the chain Jābir b. Yazīd b. al-Ḥārith al-Ju'fī al-Kūfī, (d. 127 or 132 /744 or 749) Jābir was considered a liar by many scholars i.e. Ayyūb al-Sakhtiyānī, Abū Ḥanīfah and Layth b. Abī Sulaym. He was also criticised in his bad beliefs about the *raj'ah* (i.e. to believe that 'Alī b. Abī Ṭālib will come back to life). However some scholars considered him as an acceptable narrator. See al-Dhahabī, *Mẓān al-'itidāl* 1:379; Ibn Ḥajar al-'Asqalānī, *Taqrīb al-Tahdhīb*, p. 192. The first part of the *ḥadīth* has another transmission from 'Alī. It is related by Aḥmad 1:119 from Hammām, from Qatādah from Abī Ḥassān, from 'Alī.

²¹ *ḍa'īf*. It is related by al-Dāraquṭnī 3:143-144 with an addition: "He did not compensate him for his slave." Ibn Mājah related it also, 2664 p. 2637; al-Bayhaqī, *al-Sunan al-kubrā*, 8:36. Ismā'īl b. 'Ayyāsh related the *ḥadīth* also, from Ishāq b. 'Abd Allah b. Abī Farwah, from Ibrāhīm b. 'Abd Allah b. Ḥunayn, from 'Alī b. Abī Ṭālib. This is related by Abū Ya'lā Aḥmad b. 'Alī b. al-Muthannā al-Mūsīlī, *al-Musnad*, 1:404; al-Bayhaqī, *al-Sunan al-kubrā*, 3:36; Ibn Mājah 2664 p. 2637. This *ḥadīth* is considered *ḍa'īf* because of Ismā'īl b. 'Ayyāsh al-'Ansī al-Ḥimṣī (181/797). In fact, there are three opinions about Ibn 'Ayyash:

(i) al-Nasā'ī, Ibn Ḥibbān and Abū Ishāq al-Fazārī said that he is *ḍa'īf*.

(ii) al-Fasawī said that he is *thiqah*.

(iii) The reasonable opinion which depends on probing all the relation of Ibn 'Ayyash is that of Aḥmad, al-Bukhārī, Ibn Ma'in and others. They accept his narration from *ahl al-Shām* and reject his narration from *ahl al-Ḥijāz*. See al-Dhahabī, *Mẓān al-'itidāl* 1:240-244; *al-Kāshif*, 1:248-249.

Although Ibn 'Ayyāsh related this *ḥadīth* from al-Awzā'ī, the *imām* of *ahl al-Shām*, his relation is still unacceptable because of another *'illah* (defect). It is that Ibn 'Ayyash was confused (i.e. *muḍṭarīb*) in his relation. In addition, Muḥammad b. 'Abd al-'Azīz al-Ramlī who related the *ḥadīth* from Ibn 'Ayyash was also considered to be *ḍa'īf*. This is according to some scholars' view. In fact, I do not agree with this, due to the fact that al-Fasawī said: he was *ḥafīẓ*. In addition both Bukhārī and

The same *ḥadīth* is relates by al-Dāraquṭnī from al-Ḥusayn b. al-Ḥasan al-Anṭākī from Muḥammad b. 'Abd al-Ḥakam al-Ramlī from Muḥammad b. 'Abd al-'Azīz al-Ramlī from Ismā'īl.

Juwaybir, al-Burrī, Jābir and Ibn 'Ayyāsh are all *ḍa'īf*.

This was disputed with the following evidence:

- [10] Hishām relates from al-Ḥasan from Samurah that the Prophet said: "If anyone kills his slave we will kill him and if anyone mutilates his slave we will mutilate him."²²

However, according to Ibn Ḥibbān, al-Ḥasan did not receive *ḥadīth* from Samurah. Additionally this comes in the form of a threat for deterrent purposes only and was possibly not carried out.

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al-Nasā'ī in their books relied on his narration. However, the second transmission is *ḍa'īf* because of Ibn Abī Farwah who was described as *matrūk*. See al-Dhahabī, *Mẓān al-'itidāl* 1:193 and *al-Kāshif*, 1:237.

²² *ḍa'īf*. It is related by Aḥmad 5: 10, 11, 12, 18; al-Nasā'ī, *al-Sunan al-kubrā*, 4:218; Abū Dāwūd 4515 p. 1554; al-Tirmidhī 1414 p. 1794; Ibn Mājah 2663 p. 2637; al-Dārimī, *al-Sunan*, 2:250; al-Bayhaqī, *al-Sunan al-kubrā* 8:35; Ibn Abī Shaybah Abū Bakr 'Abd Allah b. Muḥammad, *al-Muṣannaḥ*, 5:412 no. 27498; 'Abd al-Razzāq al-Ṣan'ānī, *al-Muṣannaḥ*, 9:488; al-Ḥākim Muḥammad b. 'Abd Allah, *al-Mustadrak*, 4:408; al-Ṭabarānī Sulaymān b. Aḥmad, *al-Mu'jam al-Kabīr*, 7:197, 198, 223. All from al-Ḥasan b. Yasār al-Baṣrī, from Samurah. Al-Ḥasan was well known as *mudallis*, and he did not say clearly that he heard the relation from Samurah.

Another example of this is the *ḥadīth* that says:

[11] “If he drinks (alcohol) for a fourth time then kill him.”²³

I [i.e. al-Dhahabī] say: This is a vile view.

Most scholars and a group of Companions and *Tābi‘īn* have said that a freeman is not to be killed for killing a slave. They have sought to prove this through the *ḥadīths* which the author mentions which are specific *ḥadīths* and the principle is that the specific overrides the general. They also produce evidence of consensus that

²³ *ṣaḥīḥ*. A group of Companions related that the Prophet said: “If anyone drinks alcohol flog him, then if drinks flog him, then if he drinks flog him, and if he drinks for a fourth time then kill him.” Amongst those are:

(i) ‘Abd Allāh b. ‘Amr b. al-‘Āṣ. It is related by Aḥmad 2:166, 214; al-Ḥākim Muḥammad b. ‘Abd Allah, *al-Mustadrak*, 4:372 from Shahr b. Ḥawshab al-Ahs‘arī, from Ibn ‘Amr. Aḥmad also related it 2:191, 211 from al-Ḥasan b. Yasār al-Baṣrī, from Ibn ‘Amr. It is acceptable, although the *isnād* is disconnected between al-Ḥasan and Ibn ‘Amr. This is due to the consolidation of Shahr’s relation.

(ii) Abū Hurayrah. It is related by Aḥmad 2:280, 291, 519; Abū Dāwūd 4484 p. 1551; al-Nasā’ī 5665 p. 2448, with the words “*faḍribū ‘unuqahu*” (cut off his neck.) instead of “*faqtulūh*” (kill him).

(iii) ‘Abd Allah b. ‘Umar b. al-Khaṭṭāb. It is related by Aḥmad 2:137; Abū Dāwūd 4483 p. 1551; al-Bayhaqī, *al-Sunan al-kubrā*, 8:313, from Ḥumayd b. Yazīd, from Nāfi‘, from Ibn ‘Umar. Aḥmad’s version is “If he drinks [i.e. alcohol] for a fourth or fifth time then kill him.” It is a weak chain because of Ḥumayd who is *majhūl*. See al-Dhahabī, *Mẓān al-‘itidāl*, 2:140. There is another transmission from Ibn ‘Umar related by al-Nasā’ī 5664 p. 2448 from Ishāq b. Rāhawayh, from Jarīr b. ‘Abd al-Ḥamīd, from Mughīrah b. Miqsam al-Ḍabbī, from ‘Abd al-Raḥmān b. Abī Nu‘m, from Ibn ‘Umar. This *isnād* is *ṣaḥīḥ* because the narrators are all *thiqah*.

no retaliation is due from a freeman if he injures one of the limbs of a slave; hence, if no retaliation is due for a limb of a slave then for the death of a slave there is even less reason for retaliation.²⁴ Abū Ḥanīfah and his followers argue using the generality of the Qur'ānic verses and the *ḥadīths* which point to the fact that the blood of Muslims is equal.²⁵ There is no doubt that the evidence of the majority is clear and plain on this issue. A group of Companions, including Abū Bakr, 'Umar and 'Alī said the same thing and we do not know of any Companion who opposed them, and Allah knows best.

The author here brings up the issue of killing a wine drinker on the fourth occasion of drinking. Scholars have differed about the issue of killing a wine drinker if the statutory punishment has been carried out upon him three times. The majority of scholars, including the leaders of the four main schools of law, say that he is not to be killed but rather flogged. They produce a number of *ḥadīths* as evidence, amongst

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(iv) Mu'āwiya b. Abī Sufyān. This was related by Aḥmad 4:95; Abū Dāwūd 4482 p. 1551; Ibn Mājah 2573 p. 2631; Ibn Ḥibbān, *al-'Iḥsān fī taqrīb Ṣaḥīḥ Ibn Ḥibbān*, 10:295-296; al-Ḥākim Muḥammad b. 'Abd Allah, *al-Mustadrak*, 4:372.

²⁴ See: Ibn Qudāmah, *al-Mughnī*, 11:473; and Imām Mālik, *al-Muwaṭṭa*, 2:872; and al-Shāfi'ī, *al-Umm*, 8/).

²⁵ See al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 1:192; and Ibn Nujaym al-Ḥanafī, *al-Baḥr al-rā'iq sharḥ Kanz al-daqa'iq*, 8:337.

which is the *ḥadīth*: “The blood of a Muslim who testifies that there is no deity but Allah is protected except in three cases . . .”²⁶, and the *ḥadīth* of al-Nu‘aymān b. ‘Amr b. Rifā‘ah al-Anṣārī²⁷ who was flogged by the Prophet and not killed despite the fact that he repeatedly drank wine until some of the Companions said: “Allah curse him for what he so often does”. They (the majority) reply to the *ḥadīths* which order that he be killed on the fourth occasion by saying that they have been abrogated and some of them relate that there is consensus upon this. Al-Tirmidhī says: “Action according to this is found amongst the generality of the people of knowledge and we do not know of any dispute amongst them either formerly or latterly.”²⁸ Al-Nawawī also relates consensus on this issue.²⁹ Ibn Taymīyah also gave validity to this opinion.³⁰

Other scholars say that the order to kill him has not been abrogated. However, they dispute as to whether it is mandatory to kill him or whether it is merely allowable by

²⁶ See *ḥadīth* no. 4.

²⁷ He is mentioned in some versions as al-Nu‘aymān or Ibn al-Nu‘aymān, while in other versions is ‘Abd Allah whose nickname is *ḥimār* (donkey). This might be due to the narrators or there were two persons: al-Nu‘aymān and his son ‘Abd Allah who were both lashed for drinking wine. See al-Bukhārī, 6774, p. 565 and 6780 p.566; Ibn Hajar, *al-‘Iṣābah fī tamyīz al-ṣaḥābah*, 3:540; Aḥmad Shākir’s commentary on *al-Musnad*, 9:59-60.

²⁸ See al-Tirmidhī, *al-Sunan*, *ḥadīth* no.1444 p.1798.

²⁹ See Al-Nawawī’s commentary on *Muslim*, 5:218.

way of exemplary punishment and subject to the choice of the Imām, according to what he sees as the common good for the Muslims. Ibn Ḥazm is of the first opinion,³¹ as is the later scholar Aḥmad Shākir.³² Ibn Qayyim is of the second opinion,³³ as is al-Suyūṭī.³⁴ They answer the claim of consensus by saying that there is no consensus but that there are authentic traditions from ‘Abd Allah b. ‘Amr and ‘Abd Allah b. ‘Umar who both held that a wine drinker on the fourth occasion should be killed. As for abrogation, there is no clear and correct evidence which warrants this. As for the *ḥadīth* “The blood of a Muslim who testifies that there is no deity but Allah is protected . . .” it is general, while the *ḥadīth* ordering killing is specific, and what is specific is given priority over what is general as already stated.³⁵

[Issue 3] A father is not killed for killing his son

Mālik said: If the father lays his son down and kills him, he should be killed for it.

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³⁰ See *Majmū‘ al-Fatāwā*, 34:217.

³¹ See *Al-Muḥallā*, 11:365.

³² See Aḥmad Shākir’s commentary on *al-Musnad*, 9:68.

³³ See Ibn al-Qayyim, *Tahdhīb al-Sunan*, 6:236.

³⁴ Aḥmad Shākir’s commentary on *al-Musnad*, 9:68-69.

Dāwūd said: He should be killed for killing his son.

The *ḥadīth* evidence

- [12] **Ibn Lahī'ah relates from 'Amr b. Shu'ayb from his father from his grandfather, [from 'Umar b. al-Khaṭṭāb]³⁶ that the Messenger of Allah said: "A father is not punished for killing his son."³⁷ Aḥmad related this.**

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³⁵ See al-Albānī, *al-Silsilah al-Ṣaḥīḥah*, *ḥadīth* no. 1360; and Aḥmad Shākir's commentary on *al-Musnad*, 9:40-70.

³⁶ This is missing in the manuscript. I added it from Aḥmad's *Musnad*, 1:22.

³⁷ *ṣaḥīḥ*. It is related by Aḥmad 1:22. The *isnād* is *ḍa'īf* because of Ibn Lahī'ah 'Abd Allah al-Ḥaḍramī (d.174/790) the judge and the jurist of Egypt in his era. According to Yahya b. Bukayr the deficiency occurred in his narration when his books got burned at the end of his life (170/786) 'Uthmān b. Ṣāliḥ said that Ibn Lahī'ah got hemiplegia which affected his memory. Al-Awzā'i, Shu'ba, al-Thawrī, 'Amr b. al-Ḥārith, 'Abd Allah b. al-Mubārak, 'Abd Allah b. Wahb, 'Abd Allah b. Maslamah al-Qa'nabī and 'Abd Allah b. Yazīd al-Muqri', all of them heard from him during his good mentality so their relations are acceptable and others' are unacceptable. This is one of the views of the scholars of *ḥadīth* about Ibn Lahī'ah. Others considered him absolutely *thiqah*. Ibn Ma'in, 'Abd al-Raḥmān b. Maḥdī, 'Alī b. al-Madīnī, and Ibn Ḥibbān said he is *ḍa'īf* before and after his books got burned. Moreover, Ibn Lahī'ah was also, '*mudallis*'. See al-Dhahabī, *Mẓān al-'i'tidāl*, 3:189-197; Ibn Ḥajar al-'Asqalānī, *Tahdhīb al-Tahdhīb*, 2:411-414 and *Ṭabaqāt al-Mudallisīn*, ed. 'Āṣim al-Qaryūṭī p. 54. In fact, Ibn Lahī'ah was not the sole narrator from 'Amr b. Shu'ayb. Two other transmitters agreed with him in his relation:

(i) Ḥajjāj b. Arṭa'ah al-Kūfī who was also criticized in his memorization and considered to be *mudallis*. See *ḥadīth* no. 13 and al-Dhahabī, *al-Kashef*, 1:311; and Ibn Ḥajar, *Ṭabaqāt al-Mudallisīn*, p. 49.

(ii) Muḥammad b. 'Ajlān al-Madanī, '*thiqah*'. There is a story added in this version saying that: "A man from the tribe of Mudlij had a slave girl from whom he got a child. One day when the child became a young man his father called the slave [i.e the child's mother] and ordered her to do so and so, but the young man shouted at his father: 'No, she will never obey you! How long will you keep treating my mother as a slave?' The father flared up and threw his sword at his son. The sword hit his leg so he bled to death. The father rushed with a group of people from his tribe to 'Umar b. al-Khaṭṭāb who said to him: "Oh, foe of himself, you have killed your son! I would kill you if I have not heard

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- [13] (al-Tirmidhī): Abū Khālīd al-Aḥmar relates from Ḥajjāj b. Arṭa'ah from 'Amr b. Shu'ayb from his father from his grandfather, that 'Umar said: "I heard the Messenger of Allah saying that a father is not punished for killing his son."³⁸
- [14] (al-Tirmidhī): Ismā'īl b. 'Ayyāsh relates from al-Muthannā b. al-Ṣabbāḥ from 'Amr b. Shu'ayb from his father from his grandfather, that Surāqah b. Mālīk said: "I witnessed the Messenger of Allah compensating a father for his son and not compensating a son for his father."³⁹

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the Prophet said: 'A father is not killed for killing his son...' This is related by Ibn al-Jārūd 'Abd Allah b. 'Alī, *al-Muntaqā*, no. 788; al-Dāraquṭnī 3:140-141; al-Bayhaqī, *al-Sunan al-kubrā*, 8:38.

³⁸ *ṣaḥīḥ*. This is another link for the last *ḥadīth*. It is related by al-Tirmidhī no. 1400 p. 1793; Ibn Mājah no. 2662, p. 2637; Aḥmad, 1:16, 22; al-Dāraquṭnī 3:140; Ibn Abī Shaybah Abū Bakr 'Abd Allah b. Muḥammad, *al-Muṣannaḥ*, 5:450 no. 27884. All from Ḥajjāj b. Arṭa'ah al-Kūfī, from 'Amr b. Shu'ayb .. etc. This variety of links consolidates the *ḥadīth* and upraise it to a *ṣaḥīḥ* grade.

³⁹ *ḍa'īf*. It is related by al-Tirmidhī 1399 p. 1793; al-Dāraquṭnī 3:142. al-Tirmidhī said: "We do not know from Surāqah any other transmission to this *ḥadīth* and it's *isnād* is not *ṣaḥīḥ*. Ismā'īl b. 'Ayyāsh related it from al-Muthannā b. al-Ṣabbāḥ who was considered weak in his transmissions. Abū Khālīd al-Aḥmar related the *ḥadīth* from al-Ḥajjāj b. Arṭa'ah, from 'Amr b. Shu'ayb, from his father, from his grandfather, from 'Umar, from the Prophet. It also was related from 'Amr b. Shu'ayb in a *mursal* form. This *ḥadīth* has *iḍṭirāb* [i.e. disorder in its transmissions.] The people of knowledge however, acted upon that if a father kills his son he should not be killed and if he slanders his son he should not be punished." See also Imām Mālīk, *al-Muwaṭṭa'*, tr. Bewley p. 366; 'Abd al-Razzāq al-Ṣan'ānī, *al-Muṣannaḥ*, 9:405; al-Bayhaqī, *al-Sunan al-kubrā*, 8:38; Ibn 'Abd al-Barr, *al-Tamhīd*, 22:441; al-Zayla'ī, *Naṣb al-rāyah*, 4:340.

These are all *ḍa'if*.⁴⁰

- [15] (al-Tirmidhī): Ismā'īl b. Muslim relates from 'Amr b. Dīnār, from Ṭāwūs from Ibn 'Abbās, that the Prophet said: "A father is not killed for killing his son."⁴¹

Ismā'īl is *matrūk*.

The majority of scholars say that retaliation is not to be exacted from a father for killing his son and that fining him the amount of the bloodmoney is sufficient. They bring forth as evidence various *ḥādīths*, some of which the author has included. Despite some of them being weak in certain ways, others are authentic and the proliferation of ways and witnesses confirms the authenticity of the contents. This confirms the action of certain of the Companions in this regard including the Caliph 'Umar b. al-Khaṭṭāb. None of the Companions disapproved this action of 'Umar, which shows that the order was correct in their eyes. Ibn 'Abd al-Barr says: "It is a famous and widespread *ḥadith* amongst the people of knowledge in the Ḥijāz and in

⁴⁰ This is an ill abridgment done by al-Dhahabī for Ibn al-Jawzī's words as the word "they" could be understood to be referred to all the above narrators while Ibn al-Jawzī's words is: "Ibn Lahī'h, al-ḥajjāj, al-Muthannā and Ismā'īl b. Muslim all are *ḍu'afā'*". See *al-Taḥqīq*, 2:311.

⁴¹ *ḍa'if*. It is related by al-Tirmidhī 1401 p. 1793; Ibn Mājah no. 2661, p. 2637; Aḥmad 1:49; al-Dāraquṭnī 3:142 all from 'Umar b. al-Khaṭṭāb. There is an addition in the beginning of the *ḥadīth*: "*Ḥudūd* should not be carried out in mosques". al-Tirmidhī weakened its *isnād*. However, al-Albānī authenticated the *ḥadīth* in his *'Irwā' al-ghalīl fī takhrīg aḥādīth Manār al-sabīl*, 7:268-272.

‘Irāq. Its fame, acceptance, and action in accordance to it make it exempt of *isnād* so that the *isnād* in *ḥadīths* like it almost become an affectation because of its fame.”⁴²

There is no difference between deliberate or accidental killing amongst most of the scholars, in opposition to Mālik who says that if a father kills his son in a way which points to it being intentional, like murdering him without pity as if he was slaughtering him, then retaliation would be applied to him. There is nothing in the *ḥadīth* which points to this and in fact there could be that which points to the opposite of his opinion. This is because Mālik believes, as do the majority, that if anyone throws an iron object that usually causes death, such as a sword, a person should be killed, for this is intentional killing in which retaliation is applicable. In some versions it is said that the man who killed his son had thrown his sword at him and this was regarded as intentional killing, whereas Mālik made it intentional in cases other than the father with his son; but this is not clear, and therefore the opinion of the majority is preferred and Allah knows best.

Other related issues and comments:

1. The term father also includes the grandfather and beyond whether on the father or mother's side.

⁴² See *al-Tamhīd*, 23:437.

2. The mother is not liable to be killed for her son because her status is higher than the father who is also not to be killed; likewise the grandmother and beyond.
3. The paternal uncle, even if sometimes he is called the father, does not come into this issue by consensus. Hence, retaliation is applied to him if he kills the son of his brother. This is the same for all other relatives.
4. The father through suckling is as the rest of the relatives in that retaliation is applied to him.
5. If one of the two parents kills the other and they have a child, then retaliation is not mandatory upon the killer because the relative of the victim is the son of the killer and it is not permitted that a child take retaliation from his parent.⁴³

[Issue 4] A group is killed for killing a single person

Also from Aḥmad: They are not to be killed, as Dāwūd said.

- [16] **Yahya b. Sa'īd al-Anṣarī relates that Ibn al-Musayyib said: "A person was killed in Ṣan'ā' and 'Umar killed seven people for it and said: 'Had all the**

⁴³ See: al-Shāfi'ī, *al-Umm*, 6:36; al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 1:203; Ibn Qudāmah, *Al-Mughnī*, 11:483-487; Ibn 'Abd al-Barr, *Al-Tamhīd*, 23:436-446; Ibn al-'Arabī, *Aḥkām al-Qur'ān*, 1:95; 'Al-Mawsū'ah al-Fiqhīyah' 33:267.

people of Ṣan'ā' joined forces against him, I would have counted them all together.”⁴⁴

The opinion that a group is killed for killing an individual is the opinion of the majority of jurists. It is also the well-known view of Aḥmad. The second view is that the entire group is not killed for killing an individual. The proponents of this second opinion themselves form two groups. One group is of the opinion that the blood relative should select one of the group to be killed and blood money should be taken from the others according to their share. The other group is of the opinion that retaliation is not applicable and that only blood money was mandatory. They argue using as evidence the outer meaning of the Qur'ānic verse: “. . . a life for a life.”⁴⁵, and that equality does not exist between a group and an individual. Ibn al-Mundhir says: “There is no evidence for he who says that a group is to be killed for the murder of a single person.”⁴⁶ The majority bring forward the evidence of the action

⁴⁴ *ṣaḥīḥ*. It is related by al-Dāraquṭnī 3:202; Mālik, *al-Muwaṭṭa'*, tr. Bewley, no. 13 p. 368; Ibn Abī Shaybah Abū Bakr 'Abd Allah b. Muḥammad, *al-Muṣannaf*, 5:428; 'Abd al-Razzāq al-Ṣan'ānī, *al-Muṣannaf*, 9:476. All from Yaḥyā b. Sa'īd, from Sa'īd b. al-Musayyib. al-Bukhārī has another transmission for it in. This is in *al-jāmi' al-ṣaḥīḥ*, no. 6896 p. 575 from Yaḥyā al-Qaṭṭān, from 'Ubayd Allah al-'Umarī, from Nāfi', from Ibn 'Umar that 'Umar b. al-Khaṭṭāb said, when a boy was assassinated, “Had all the people of Ṣan'ā' joined forces against him, I would have counted them all together.” See also, Ibn Ḥajar al-'Asqalānī, *Fatḥ al-Bārī*, 12:227-228.

⁴⁵ *al-Mā'idah* 5:45.

⁴⁶ Ibn Qudāmah, *al-Mughnī*, 11:490.

of 'Umar and his speech in the presence of the Companions none of whom disapproved of the action. Hence, there was consensus. It is also related of 'Alī b. Abī Ṭālib.: "A group of men went on a journey and another man accompanied them. When they arrived the man was not with them so his relatives accused them. Shurayḥ said: 'Either you bear witness that they killed your relative or they swear an oath to Allah that they did not kill him.' They were brought to 'Alī and I [i.e. Sa'īd] with him. Alī separated them and they confessed and I heard 'Alī saying: 'I am Abū al-Ḥasan, I am the master.' Then he ordered that they be killed and they were killed."⁴⁷

Ibn 'Abbās said: "Even if one-hundred men killed a single man they would be killed for it."⁴⁸ These reports are from the greatest jurists of the Companions. In addition to that, the opinion that a group is not killed for killing an individual means the end of retaliation because anyone who wishes to kill a person will simply enlist the aid of

⁴⁷ *ṣaḥīḥ*. It is related by Ibn Abī Shaybah Abū Bakr 'Abd Allah b. Muḥammad, *al-Muṣannaf*, 5:428 from Wakī', from Isrā'īl, from Abū Ishāq, that Sa'īd b. Wahb said...This *isnād* is *jayyid* as for all the transmitters are *thiqāt* (trustworthy.)

⁴⁸ *ḍa'īf*. It is related by 'Abd al-Razzāq al-Ṣan'ānī, *al-Muṣannaf*, 9:479, from Ibrāhīm, from Dawūd b. al-Ḥuṣayn, from 'Ikrimah, from Ibn 'Abbās. This *isnād* is very weak because of the *Shaykh* of 'Abd al-Razzāq, Ibrāhīm b. Yazīd al-Khūzī about whom Aḥmad and Ibn Ma'in said: he is *matrūk* (very weak). See al-Dhahabī, *Mẓān al-'itidāl*, 1:75.

another person so that retaliation will not apply. This is something very easy especially in those places where racial and religious disputes proliferate.⁴⁹

[Issue 5] In the case of killing with a heavy object, the death penalty is mandatory if the object can generally be used for killing

Abū Ḥanīfah says it is not mandatory except in cases where a sharp object is used.

The *ḥadīth* evidence:

- [17] (al-Bukhārī and Muslim): from Qatādah from Anas: “A Jew smashed the head of a woman between two stones and killed her, so the Prophet smashed the Jew’s head between two stones.”⁵⁰
- [18] Ibn Jurayj [reports] from ‘Amr b. Dīnār from Ṭāwūs from Ibn ‘Abbās, that ‘Umar said: “He sought out the Messenger of Allah regarding an unborn baby, then Ḥamal b. Mālik came and said: ‘I saw one woman beat another

⁴⁹ For more details see Ibn Qudāmah, *al-Mughnī*, 11:490; al-Mīrghinānī ‘Alī b. Abī Bakr al-Ḥanafī, *al-Hidāyah sharḥ Bidāyat al-mubtadī*, 4:512; Ibn ‘Abd al-Barr, *al-Kāfī fī fiqh ahl al-Madīnah*, 2:384.

⁵⁰ *ṣaḥīḥ*. It is related by Aḥmad 3:183; al-Bukhārī, *al-jāmi‘ al-ṣaḥīḥ*, 2413 p. 189; Muslim 1672 p. 973; Abū Dāwūd no. 4535 p. 1556; al-Tirmidhī no. 1394 p. 1792-1793; al-Nasā’ī no. 4746 p. 2395;

with a rolling pin and she died along with her unborn baby. The Prophet ruled that a slave should be paid in full blood money for the unborn child and that the killer be put to death.”⁵¹

This was disputed with the following evidence:

- [19] **Shu‘bah [relates] from Ayyūb from al-Qāsim b. Rabī‘ah from ‘Abd Allah b. ‘Amr that the Messenger of Allah said: “In the case of unintentional or quasi-intentional killing, by a whip or a stick, the full blood money is one-hundred (camels), forty of which must be with calf.”**⁵²

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Ibn Mājah no. 2665 p. 2637; al-Dāraquṭnī 3:168-169; Ibn Abī Shaybah Abū Bakr ‘Abd Allah b. Muḥammad, *al-Muṣannaḥ*, 5:409. All from Qatādah, from Anas b. Mālik.

⁵¹ *ṣaḥīḥ*. It is related by Aḥmad 1:364; 4:79; Abū Dāwūd no. 4572 p. 1559; Ibn Mājah no. 2641 p. 2636; al-Dāraquṭnī 3:115-116; al-Ṭabarānī, *al-Mu‘jam al-Kabīr*, 4:8 no. 3482.

⁵² *ḍa‘īf*. It is related by Aḥmad 2:164, 166; Abū Dāwūd no. 4547 p. 1557; al-Nasā’ī no. 4795- 4798 p. 2398; Ibn Mājah no.2627-2628 p. 2635; al-Dāraquṭnī 3:104-105. Al-Qāsim transmitted this in different ways:

- (i) From ‘Uqbah b. Aws, from ‘Abd Allāh b. ‘Amr b. al-‘Āṣ.
- (ii) From ‘Uqbah b. Aws, from one of the Companions.
- (iii) From ‘Uqbah b. Aws, from the Prophet without mentioning the Companion. In *ḥadīth* terminology this sort of transmissions called *muḍṭarib*. A *muḍṭarib* according to the *muḥaddithūn* is a sort of weak *ḥadīth* because it indicates that the narrator has lost his ability in memorizing the *ḥadīth* firmly. Therefore, Ibn al-Jawzī considered it a weak transmission.

The *muḍṭarib* has two conditions:

- (i) A number of transmissions differ in a way that there is no harmony can be achieved. This might be in *isnād* or in *matn* (text.). the example for the *isnād* is the *ḥadīth* mentioned above. For the text is the *ḥadīth*: “There is no right entitled on property more than *zakāh*.” And the other version:

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This is related by al-Qāsim once from Ya'qūb b. Anas and at other times from 'Uqbah b. Aws from a Companion of the Prophet, and at other times from Ibn 'Umar.

We would understand this stick, which is mentioned with a whip, to be a small stick.

- [20] Ishāq b. Sunayn [relates] from Khālīd b. Mirdās from Mu'allā b. Hilāl from Abū Ishāq from 'Āṣim b. Ḍamurah from 'Alī that the Messenger of Allah said: "In the case of the killing of a person there is no retaliation except when an iron object is used."⁵³

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"There is right entitled on property more than *zakāh*." It is clear that there is no way to harmonize these two versions.

(ii) Transmitters must be of the same grade. If one is *thiqah* and the other is *ṣaḍūq* or weak then the *thiqah*'s transmission is preferred.

On some occasions *ḥadīth*'s jurists may prefer a transmission to another due the large number of narrators. In other occasions they give preference to the excellent *ḥāfiẓ* over a group of ordinary transmitters. It is worthy to say that the *muḍṭarib* is a part of the science of *'ilal* (defects) which is a very complicated and abstruse topic in the science of *ḥadīth*. It requires extensive knowledge in both *ḥadīth* and *fiqh*. Hence, only few scholars tackled this topic such as Imām Aḥmad, al-Tirmidhī and al-Daraqutnī. We also should not be astonished when we find the scholars differ in their statement regarding a certain *ḥadīth* such as the above mentioned one. Both Ibn Ḥibbān and Ibn al-Qaṭṭān authenticated it. See Ibn Ḥajar, *al-Talkhīṣ al-ḥabīr*, 4:15 and *al-Nukat 'alā Ibn al-Ṣalāḥ*, 2:772; al-Zayla'ī, *Naṣb al-rāyah*, 4:331; al-Albānī authenticated it in his *'Irwā' al-ghalīl fī takhrīg al-ḥadīth Manār al-sabīl*, 7:255-258; M. Azami, *Studies in Ḥadīth Methodology and Literature*, p. 66.

⁵³ *ḍa'if jiddan* (very weak.) It is related by al-Daraqutnī 3:87-88. There are other transmissions for the *ḥadīth*, some of which will be mentioned next. However, all of them are weak. See al-Bayhaqī, *al-Sunan al-kubrā*, 8: 63; Ibn al-Jawzī, *al-'Ilal al-mutanāhiyah fī al-aḥādīth al-wāhiyah*, 2:792; Ibn

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This *ḥadīth* mentions Mu'allā whom Ibn Ma'in said that he was a fabricator of *ḥadīth*. Additionally, if it is reliable then its meaning is: retaliation is only carried out using an iron object, which agrees with our traditions.

- [21] From Nu'aym b. Ḥammād from Baqiyyah from Abū Mu'ādh from al-Zuhrī from Ibn al-Musayyib that Abū Hurayrah said: "Retaliation is only inflicted with a sword."⁵⁴

- [22] From al-Musayyab b. Wāḍiḥ from Baqiyyah from Abū Mu'ādh from al-Zuhrī from 'Abd al-Karīm b. Abī al-Mukhāriq from Ibrāhīm from 'Alqamah from Ibn Mas'ūd that the Messenger of Allah said: "Retaliation is only to be carried out with a weapon."⁵⁵

This is related by al-Dāraquṭnī [and] Abū Mu'ādh is *matrūk*.

- [23] Sulaymān b. Kathīr [relates] from 'Amr b. Dīnār from Ṭāwūs from Ibn 'Abbās that the Messenger of Allah said: "If anyone is killed in the midst of

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Ḥajar, *al-Talkhīṣ al-ḥabīr*, 4:19; al-Zayla'ī, *Naṣb al-rāyāh*, 4:341; al-Albānī, *'Irwā' al-ghalīl fī takhrīg aḥādīth Manār al-sabīl*, 7:285 ff.

⁵⁴ *ḍa'īf*. It is related by al-Dāraquṭnī 3:87; Ibn 'Adī, *al-Kāmil*, 3: 252 and 6:388. al-Dāraquṭnī said: "Abū Mu'ādh is Sulaymān b. Arqam and he is *matrūk*." See also *ḥadīth* no. 20.

⁵⁵ *ḍa'īf*. It is related by al-Dāraquṭnī 3:88; al-Ṭabarānī, *al-Mu'jam al-Kabīr*, 10:89; Ibn 'Adī, *al-Kāmil*, 5:354. al-Dāraquṭnī said: "Sulaymān b. Arqam is *matrūk*." See also *ḥadīths* 20, 21.

confusion or by a thrown stone or by a whip or a staff then the blood money is the same as that for unintentional killing.”⁵⁶

The *isnād* for this is *jayyid*. However, it is about unintentional killing.

- [24] From al-Thawrī from Jābir from Abū ‘Āzib from al-Nu‘mān b. Bashīr from the Prophet: “Everything except killing by the sword is unintentional and all unintentional killing demands full blood money.”⁵⁷

Jābir is *wāhī*.

- [25] This was also related by Warqā’ from Jābir.

Warqā’ explained the name of Abū ‘Āzib as Muslim b. Ārāk. This is related by al-Dāraqūṭnī.

- [Issue 6] If someone holds a person and another kills him, the holder is imprisoned and the killer is killed

Also from Aḥmad is that they should both be killed, as Mālik said.

⁵⁶ *ṣaḥīḥ*. It is related by al-Dāraqūṭnī 3:94; Abū Dāwūd no. 4540 p. 1556; al-Nasā’ī no. 4793-4794 p. 2398; Ibn Mājah no. 2635 p. 2635. See for details al-Zayla‘ī, *Naṣb al-rāyāh*, 4:331-332.

⁵⁷ *ḍa‘īf*. It is related by al-Dāraqūṭnī 3:106; Aḥmad 4:275; al-Bayhaqī 8:42.

- [26] Abū Dāwūd al-Ḥafṛī relates from Sufyān, from Ismā'īl b. Umayyah from Nāfi', from Ibn 'Umar: "If a man holds someone and another kills him, the killer is to be killed and the holder is to be imprisoned." This is related by al-Dāraquṭnī.⁵⁸

I [i.e. al-Dhahabī] say: This is a *munkar ḥadīth*, and is probably one of the sayings of Ibn 'Umar.

- [Issue 7] A blood relative has the right to forgo retaliation in favour of full blood money without the consent of the felon

Abū Ḥanīfah said: He does not have this right without the consent of the felon.

- [27] Ibn Ishāq relates from al-Maqburī, from Abū Shurayḥ al-Khuzā'ī that the Messenger of Allah said on the day of the liberation of Mecca: "If anyone is killed henceforth, his family will have one of two choices. If they wish for the blood of the killer then this will be so, and if they wish blood money then this will be so." This is related by Aḥmad.⁵⁹

⁵⁸ *munkar*. It is related by al-Dāraquṭnī, 3:103, al-Bayhaqī, 8:50.

⁵⁹ *ṣaḥīḥ*. It is related by Aḥmad 4:31; al-Dāraquṭnī 3:96; Abū Dāwūd no. 4496 p. 1552; Ibn Mājah no. 2623 p. 2634; al-Dārimī no. 2351.

- [28] **Muḥammad b. Salamah al-Ḥarrānī relates from Muḥammad b. Ishāq from al-Ḥārith b. al-Faḍl from Sufyān b. Abī al-‘Awjā’ from Abū Shurayḥ that he heard the Messenger of Allah saying: “If anyone is killed or maimed there is one of three choices and no more: either retaliation, or forgiveness or taking blood money. If one of these three is accepted and afterwards exceeded then the perpetrator will be in Hellfire forever.”⁶⁰**

There is unanimity among jurists regarding the permissibility of forgoing retaliation. It is also agreed upon that forgoing retaliation is better than retaliation because Allah says: “But if someone is absolved by his brother, blood money should be claimed with correctness and paid with good will. That is an easement and mercy from your Lord.”⁶¹ It is reported from Ibn ‘Abbās that retaliation was prescribed upon the Children of Israel while both forgoing and blood money were prohibited.⁶² Qatādah also said: Allah had mercy on this Muslim nation by legitimating blood money which was not lawful for any nation before. The Jews were allowed to either apply retaliation or forgiveness but they were not allowed to take blood money. This is in contrast with the Christians for whom forgiveness was applicable without

⁶⁰ This is another version for *ḥadīth* 27.

⁶¹ *Al-Baqarah* 2:177.

⁶² See al-Bukhārī, *al-jāmi‘ al-ṣaḥīḥ*, 4498 p. 369 and 6881 p. 574. Sa‘īd b. Manṣūr, the *Sunan*, 2: 652. Ibn Jarīr al-Ṭabarī, *Jāmi‘ al-bayān*, 2:115.

compensation. Regarding the Muslim nation, they have the choice between retaliation, acceptance of blood money or mere forgiveness.⁶³ Similar is reported from from Sa'īd b. Jubayr, Muqātil b. Ḥayyān and al-Rabī' b. Anas.⁶⁴

It is also related from the Prophet that in any case that entails retaliation he requests [i.e. the victim's relatives] to forgo.⁶⁵ It also sounds reasonable -i.e. the above mentioned issue- as for retaliation is entirely the right of the victim's relatives. Hence, they, as with their other rights, can simply forgo it.

[Issue 8] In the case of premeditated murder either retaliation or full blood money is obligatory

Also from Aḥmad, retaliation is mandatory only, as Abū Ḥanīfah and Mālik said.

The *ḥadīth* evidence:

The *ḥadīth* of Abū Shurayḥ.⁶⁶

⁶³ See Ibn Jarīr al-Ṭabarī, *Jāmi' al-bayān*, 2:116.

⁶⁴ See Ibn Jarīr al-Ṭabarī, *Jāmi' al-bayān*, 2:116; al-Qurṭubī, *al-Jāmi' li aḥkām al-Qur'ān*, 2:171; Ibn Kathīr, the *Tafsīr*, 1:178.

⁶⁵ It is related by Abū Dāwūd 4497 p. 1552; al-Nasā'ī 4788 p. 2398; Ibn Mājah 2692 p. 2639, all from Anas b. Mālik.

⁶⁶ See *ḥadīth* 27.

[29] The *ḥadīth* of (al-Bukhārī and Muslim) from Abū Salamah from Abū Hurayrah that the Prophet said: "The family of a murdered person has two choices: blood money or the death of the perpetrator."⁶⁷

[30] Muḥammad b. Rāshid relates from Sulaymān b. Mūsa from 'Amr b. Shu'ayb from his father from his grandfather that the Prophet said: "He who commits premeditated murder will be given over to the relatives of the deceased and, if they wish, they can kill him or, if they wish, they can claim full blood money."⁶⁸

[Issue 9] Retaliation is to be carried out in the case of breaking a tooth as it is with tearing out a tooth.

This is in opposition to the Shāfi'ī school.

The *ḥadīth* evidence:

⁶⁷ *ṣaḥīḥ*. It is related by Aḥmad 3:385; al-Bukhārī, *al-jāmi' al-ṣaḥīḥ*, 2434 p. 191; Muslim 1355 p. 904; Abū Dāwūd 4505 p. 1553; al-Tirmidhī 1405 p.1793; al-Nasā'ī 4789 p.2398; al-Bayhaqī, *al-Sunan al-kubrā*, 8:52,53; al-Dāraquṭnī 3:96-97.

⁶⁸ *ṣaḥīḥ*. It is related by Aḥmad 2:183; Abū Dāwūd 4506 p. 1553; al-Tirmidhī no. 1387 p. 1792; Ibn Mājah 2626 p. 2635; al-Dāraquṭnī 3:177; al-Bayhaqī, *al-Sunan al-kubrā*, 8:70.

- [31] (Abū Dāwūd and al-Bukhārī): from Ḥumayd that Anas said: “al-Rubayyi‘ the daughter of al-Naḍr struck a girl and broke her tooth. Blood money was offered but refused, then forgiveness was asked for but refused so the case was taken to the Prophet who ordered retaliation. Then her brother Anas b. al-Naḍr asked the Messenger of Allah: “Is her tooth to be broken? By Allah, her tooth will not be broken.” The Messenger of Allah said: “Allah has prescribed retaliation.” Later on the family of the harmed girl decided to forgive, so the Messenger of Allah said: “There are amongst the servants of Allah those whose oath is never ignored by Allah.”⁶⁹

- [32] (al-Nasā’ī): Abū Khālīd al-Aḥmar from Ḥumayd from Anas: “The Messenger of Allah ruled in favour of retaliation in the case of a tooth.”⁷⁰

[Issue 10] Retaliation is not carried out in the case of wounding until after the healing of the wound.

al-Shāfi‘ī said: It is carried out immediately.

⁶⁹ *ṣaḥīḥ*. It is related by al-Bukhārī, *al-jāmi‘ al-ṣaḥīḥ*, no. 4500 p. 369; Muslim 1675 p. 974; Abū Dāwūd 4595 p. 1560; al-Nasā’ī 4761 p. 2396; Aḥmad 3:128, 167, 284.

⁷⁰ *ṣaḥīḥ*. It is related by al-Nasā’ī 4756 p. 2395-2396; al-Ḥākim, *al-Mustadrak*, 2:300. al-Ḥākim commented: “It is a *ṣaḥīḥ ḥadīth* and is conformable to Bukhārī and Muslim conditions.”

- [33] Ya'qūb b. Kāsib relates from 'Abd Allah b. 'Abd Allah al-'Umawī from b. Jurayj and others from Abū al-Zubayr from Jābir: "A man was wounded and wished to exact retaliation. The Messenger of Allah forbade retaliation to be taken out until the injured person had recovered."⁷¹

I [i.e. al-Dhahabī] say: This is one of the *man ākīr* of Ya'qūb.

- [Issue 11] If retaliation is taken before the healing of the wound and the effect of the wound spreads to another part of the body then there is no guarantee against the perpetrator.

This contradicts the majority opinion.

- [34] al-Qawārīrī relates from Muḥammad b. Ḥumrān from b. Jurayj from 'Amr b. Shu'ayb from his father that his grandfather said: "A man stabbed another man in the knee with a horn so he went to the Prophet and asked for retaliation. The Prophet said: 'Wait until you heal.' Then he came again and demanded retaliation so the Prophet carried it out. Then he came later and said: 'I am crippled.' The Prophet said: 'I forbade you and you disobeyed me, so may Allah banish you. Your crippling is in vain.' Then the

⁷¹ *ḍa'if*. It is related by al-Dāraquṭnī 3:88: al-Bayhaqī, *al-Sunan al-kubrā*, 8:66, al-Ṭabarānī, *al-Mu'jam al-Awṣaṭ*, 4:234. See also, Abū Bakr al-Haythamī, *Majma' al-zwā'id*, 6:296; al-Zayla'ī, *naṣb al-rāy*, 4:378.

Messenger of Allah forbade the taking of retaliation for a wound until it was healed.”⁷²

[Issue 12] Retaliation is only to be carried out with the sword

Aḥmad also said, as did Mālik and al-Shāfi'ī that the implement used for retaliation should be the same as the implement used in the crime.

The *ḥadīth* evidence:

Ibn Mas'ūd and Abū Hurayrah both relates that the Prophet said: “There is to be no retaliation except by the sword.” These two have been mentioned before.⁷³

They argue using the *ḥadīth* that:

- [35] The Prophet said: “Whoever drowns someone we shall drown him, whoever sets fire to someone, we shall set fire to him.”⁷⁴

This, however, is not authentic. In fact Ziyād said it in his sermon.

⁷² *ḍa'if*. It is related by al-Dāraquṭnī 3:89-90; Aḥmad 2:217; 'Abd al-Razzāq al-Ṣan'ānī, *al-Muṣannaf*, 9:454 no. 17991; al-Bayhaqī, *al-Sunan al-kubrā*, 8:67. Ibn Jurayj is *mudallis*, and he did not acknowledge that he heard it from 'Amr. However, there are other transmissions from Jābir b. 'Abd Allāh. See Ibn Abī Shaybah Abū Bakr 'Abd Allah b. Muḥammad, *al-Muṣannaf*, 5:437. al-Albānī authenticated the *ḥadīth* in his *'Irwā' al-ghalīl fī takhrīg aḥādīth Manā'ir al-sabīl*, 7:298.

⁷³ See *ḥadīths* 21, 22.

Scholars have disputed over whether a person who kills using a blunt instrument like a stone or by drowning or burning or strangling deserves retaliation by the same method by which he killed so that he be stoned or drowned or burned in the same way that he did to the victim. The opinion of Mālik⁷⁵ and al-Shāfi'ī⁷⁶ and one report from Aḥmad, which is the preference of Ibn Taymīyah⁷⁷ and Ibn al-Qayyim, is that he should be killed by the same method which he used for the killing. The other opinion is that he should only be killed using the sword and this is the opinion of Abū Ḥanīfah⁷⁸. This applies as long as the way of killing is not prohibited intrinsically in the divine law as when the killer pours the victim wine until he dies or practices sodomy upon him and he dies because of this. In this case it is not permitted that he be killed in the same way. If he has killed him by burning, there are two opinions from Aḥmad. The first is that he should not be burned, on the evidence of the *ḥadīth* of Ḥamzah al-Aslamī that the Prophet said: "If you find so and so then burn him." Later, he called me and said: "If you find so and so then kill him and do

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⁷⁴ *ḍa'īf*. It is related by al-Bayhaqī, *al-Sunan al-kubrā*, 8:43 from Bishr b. Ḥāzim, from 'Imrān b. Yazīd b. al-Barā', from his father, from his grandfather. Bishr is *majhūl* (unknown.) See al-Zayla'ī, *Naṣb al-rāyāh*, 4:343-344; al-Albānī, *'Irwā' al-ghalīl fī takhrīg aḥādīth Manār al-sabīl*, 7:294.

⁷⁵ Ibn 'Abd al-Barr, *fiqh ahl al-Madīnah al-Mālikī*, 2:382.

⁷⁶ Al-Nawawī, *Rawḍat al-ṭālibīn*, 7:69ff.

⁷⁷ Ibn Taymīyah, *Majmū' al-Fatāwā*, 28:313-314.

⁷⁸ Al-Ṭahāwī, *Sharḥ ma'ānī al-Āthār*, 3:179-185.

not burn him as no-one except the Lord of the Fire may punish with fire.”⁷⁹ The second report is that he is to be burned. This is based on the *ḥadīth* of al-Barā' b. 'Āzib: “Whoever burns someone, we will burn him, and whoever drowns someone, we will drown him.”⁸⁰

Ibn al-Qayyim says: “The most authentic of the opinions is that the criminal should be treated in the same way that he treated his victim as long as what he did was not one of the things that Allah has prohibited, like killing him through sodomy or by giving him intoxicants and the like, in which case he will not be treated in the same way because it is religiously prohibited. However if he burns someone to death then he should be burned in the same way, or thrown off a cliff, or strangled, because this is closer to justice and the meaning of retaliation, revenge and prevention of further crimes which is sought from retaliation.”⁸¹

[Issue 13] ‘Deliberate’ murder in error does not necessitate retaliation

What is meant by this is a deliberate act but a mistaken intention.

⁷⁹ *ṣaḥīḥ*. This was related by Abū Dawūd no.2673, p. 1421.

⁸⁰ See *ḥadīth* [34]

⁸¹ *Tahdhīb Sunan Abū Dawūd* 12:177. For more details see Ibn Ḥazm, *al-Muḥallā*, 11:380-385; and Ibn Qudāmah, *al-Mughnī*, 11:512.

Mālik said that deliberate murder in error is impossible and requires retaliation.

- [36] Sulaymān b. Mūsā from 'Amr b. Shu'ayb from his father from his grandfather that the Prophet said: "The blood money for deliberate murder in error is as strict as the blood money for deliberate murder but the perpetrator is not to be killed. This is because Satan may cause a disagreement amongst people resulting in confusion and chaos and the throwing of stones but not deliberate war or fighting with weapons."⁸²

We have already mentioned the *ḥadīth* of al-Qāsim b. Rabī'ah from 'Abd Allah b. 'Amr that the Prophet said: "Quasi-deliberate killing, and those being killed by a whip or a stick, holds a penalty of one-hundred camels, forty of which should be with calf."

- [Issue 14] The full blood money for unintentional killing is made up of five kinds of camel: 20 *jadha'a*, 20 *ḥiqqah*, 20 *bint labūn*, 20 *bint makhāḍ* and 20 *ibn makhāḍ*

Mālik and al-Shāfi'ī said instead of *ibn makhāḍ*, *ibn labūn*.

- [37] Ḥajjāj b. Arṭa'ah from Zayd b. Jubayr from Khishf b. Mālik from Ibn Mas'ūd: "The Messenger of Allah decreed in the case of full blood money for unintentional killing: 20 *bint makhāḍ*, 20 *ibn makhāḍ*, 20 *bint labūn*, 20 *ḥiqqa*, and 20 *jadha'a*."⁸³

The other schools argue using the *ḥadīth*:

- [38] Ḥammād b. Salamah from Sulaymān al-Taymī from Abū Mijlaz from Abū 'Ubaydah that Ibn Mas'ūd said: "The full blood money for unintentional killing consists of five kind of camel: 20 *ḥiqqa*, 20 *jadha'a*, 20 *bint makhāḍ*, 20 *bint labūn* and 20 *ibn labūn*."⁸⁴

al-Dāraqūṭnī said the transmitters of this *ḥadīth* are *thiqāt*, but the *ḥadīth* of Khishf is not creditable due to his *jahāl*.

Also Ḥajjāj is a *mudallis*, and the transmitters differ in their narration from Ḥajjāj.

⁸² *ḥasan*. It is related by Aḥmad 2:183; Abū Dāwūd, 4565 p. 1558; al-Dāraqūṭnī 3:95. See Ibn al-Athīr, al-Mubārak b. Muḥammad, *Jāmi' al-'uṣūl*, 4:413.

⁸³ *ḍa'īf*. It is related by Aḥmad 1:450; Abū Dāwūd 4545 p. 1557; al-Tirmidhī 1386 p. 1792; al-Nasā'ī 4806 p. 2399; Ibn Majah 2631 p. 2635; al-Dāraqūṭnī 3:173.

The writer [i.e. Ibn al-Jawzī] states: This is contradicted by the fact that Abū 'Ubaydah did not receive *ḥadīth* from his father. In addition, he only relates the *fatwā* of his father. He [i.e. Ibn al-Jawzī] said: "When an individual is known to be reliable then it is incumbent to accept his opinion. How can we say about a reliable person that he is unknown?"

Moreover, the criterion of the scholars of *ḥadīth* that at least two people have to relate from a person [not to be considered as *majhūl*] has no basis.

I (i.e. al-Dhahabī) would say: Who has said that Khishf is reliable? Give over your vain desires and madness!

[Issue 15] Dirhams and dinars are basis for blood money, and can be taken instead of camels

Al-Shāfi'ī said: Camels are the basis but if there are none then blood money is converted to 1000 dinars⁸⁵ or 12,000 dirhams.

Aḥmad also said: Blood money is converted to the value of a camel.

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⁸⁴ *mawqūf*. It is related by al-Dāraquṭnī 3:172. al-Ṭabarī Muḥammad b. Jarir, *Jāmi' al-bayān*, 9:46. al-Dāraquṭnī said: "This *isnād* is *ḥasan*, all its transmitters are *thiqah*. al-Bayhaqī disagreed with this in his *al-Sunan al-kubrā*, 8: 75. See also, Ibn Ḥajar, *al-Talkhīṣ al-ḥabīr*, 4:21-22.

- [39] (al-Tirmidhī): Muḥammad b. Muslim al-Ṭā'ifī from 'Amr b. Dīnār from 'Ikrimah from Ibn 'Abbās that the Prophet set full blood money at 12,000 dirhams.⁸⁶

This was related by Ibn 'Uyaynah from 'Amr but he left out Ibn 'Abbās. In addition, Aḥmad considered al-Ṭā'ifī to be *ḍa'īf*.

We [i.e. Ibn al-Jawzī] would say: Yaḥyā has confidence in him [i.e. al-Ṭā'ifī] and the *rafi'* is extra.

- [40] Al-Dāraquṭnī relates from Ibn Ṣā'id from Muḥammad b. Maymūn al-Khayyāṭ from Sufyān from 'Amr from 'Ikrimah from Ibn 'Abbās that "The Prophet judged the sum of 12,000 [dirhams] for full blood money."⁸⁷

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⁸⁵ One dinar equalling 4,235 grams of gold. See Nuh Ha Mim Killer, *Reliance of the Traveller*, p. 588.

⁸⁶ *ḍa'īf*. It is related by al-Tirmidhī no. 1388 p. 1792; Abū Dāwūd 4546 p. 1557; al-Nasā'ī 4807 p. 2399; Ibn Mājah 2629 p. 2635. Although many scholars such as: Yaḥyā b. Ma'īn, 'Abd al-Raḥmān b. Maḥdī, Abū Dāwūd and others considered Muḥammad b. Muslim al-Ṭā'ifī *thiqah*, there were errors in some of his transmissions. Therefore, Ibn Ma'īn said that Sufyān b. 'Uyaynah is more authenticated than al-Ṭā'ifī in his transmitting from 'Amr b. Dīnār. Ibn Abī Ḥātim, for the same reason, chose the *mursal* form of this transmission as the most likely transmission. See Ibn Abī Ḥātim *al-'Ilal*, 1:463; Ibn Hajar, *al-Talkhīṣ al-ḥabīr*, 4:23 and *Tahdhīb al-Tahdhīb*, 3:695-696.

⁸⁷ *ḍa'īf*. It is related by al-Dāraquṭnī 3:130; Aḥmad 1:342, 351, 363; al-Nasā'ī 4808 p. 2399. See *ḥadīth* 38.

Al-Khayyāt said that Sufyān mentioned Ibn ‘Abbās once in this *ḥadīth* but mostly related it from the *Tābi‘īn*.

[Issue 16] Cattle, sheep and garments are also a basis for full blood money, which is valued at 200 cows, 2000 sheep and 200 garments

This is also what Abū Yūsuf and Muḥammad have said in opposition to the majority.

[41] (Abū Dāwūd): Ibn Ishāq says that ‘Aṭā’ mentioned from Jābir: “The Messenger of Allah imposed full blood money as 100 camels for camel-owners, and 200 cattle for cattle-owners, and 2000 sheep for sheep-owners, and 200 garments for owners of garments.”⁸⁸

[Issue 17] For loss of ears there is full blood money

Mālik said that this is subject to *ḥukūmah* (judicial ruling).

[42] Yūnus relates that Ibn Shihāb said: “I read in a letter of the Messenger of Allah to ‘Amr b. Ḥazm when he sent him to Najrān. This letter was with

⁸⁸ *ḍa‘īf*. It is related by Abū Dāwūd 4544 p. 1558; al-Bayhaqī, *al-Sunan al-kubrā*, 8:78. In the *isnād* there is Ibn Ishāq who considered *mudallis*. See al-Albānī, *‘Irwā’ al-ghalīl fī takhrīg aḥādīth Manār al-sabīl*, 7:303.

Abū Bakr b. Ḥazm in which the Prophet has the following statement written: "Full blood money for a person is 100 camels, for the loss of a nose 100 camels, for an eye 50 camels and for an ear 50 camels."⁸⁹

[Issue 18] For a blind eye, a paralysed hand, a mute tongue, a paralysed penis, and an extra finger the full blood money is a third of that for the normal healthy organ

Aḥmad and the majority say that this is subject to *ḥukūmah* in each individual case.

[43] (al-Nasā'ī): al-Haytham b. Ḥumayd from al-'Alā' b. al-Ḥārith from 'Amr b. Shu'ayb from his father that his grandfather said: "The Messenger of Allah decreed a third of the full blood money for a blind eye which is in its socket, and a third of the full blood money for a paralysed hand if cut off, and a third of the full blood money for a blackened tooth if pulled out."⁹⁰

⁸⁹ *ṣaḥīḥ*. It is related by Abū Dāwūd in his, *al-Marāṣil*, no. 257 p. 211-212; al-Nasā'ī 4857 p. 2401; Mālik, *al-Muwaṭṭa'*, Bewley, p. 358; al-Shāfi'ī, *al-'Umm*, 6:105; al-Dāraquṭnī 3:209. See also al-Albānī, *'Irwā' al-ghalīl fī takhrīg aḥādīth Manār al-sabīl*, 7: 303.

⁹⁰ *ḥasan*. It is related by al-Nasā'ī 4844 p.2401. Abū Dāwūd 4567 p. 1558 and al- Dāraquṭnī 3:128-129 both related it without mentioning the phrase: "And for the blackened tooth if pulled out a third of the compensation." See also al-Albānī, *'Irwā' al-ghalīl fī takhrīg aḥādīth Manār al-sabīl*, 7:328.

- [44] **Abū Hilāl** relates from ‘Abd Allah b. Buraydah from Yahya b. Ya‘mar that **Ibn ‘Abbās** said: “For a paralysed hand there is a third of the full blood money, and for a blind eye in its socket if gouged out a third of the full blood money.”⁹¹ This is related by al-Dāraquṭnī.

[Issue 19] **The maximum blood money for a *mūḍiḥah* wound is five camels**

Aḥmad and **Mālik** said these cases are subject to *ḥukūmah*.

- [45] **(al-Tirmidhī)** **Yazīd b. Zuray‘** from Ḥusayn al-Mu‘allim from ‘Amr b. **Shu‘ayb** from his father from his grandfather that the Prophet said: “For facial features the maximum blood money is five camels.”⁹²

[Issue 20] **If a pregnant woman is struck and dies and then a dead foetus emerges then the blood money of a slave is mandatory**

Abū Ḥanīfah and **Mālik** said that nothing is required in this case.

- [46] **(Al-Bukhārī and Muslim): Hishām b. ‘Urwah** from his father from al-Mughīrah: “ ‘Umar consulted in the matter of causing a woman’s

⁹¹ *Mawqūf*. It is related by al-Dāraquṭnī 3:214; Ibn Abī Shaybah Abū Bakr ‘Abd Allah b. Muḥammad, *al-Muṣannaḥ*, 5:377.

miscarriage. al-Mughīrah said: "The Messenger of Allah decreed full blood money of a slave or slave girl and Muḥammad b. Maslamah bore witness that he witnessed the Prophet decree this."⁹³

- [47] (Muslim): Maṣṣūr from Ibrāhīm from 'Ubayd b. Nuḍaylah from al-Mughīrah: "A pregnant woman was beaten to death by another of her husband's wives with a tent pole. The case was taken to the Prophet who decreed that the relatives of the killer were liable for full blood money, and liable for full blood money of a slave or slave girl for the foetus. The relatives said: 'Are we to compensate for one who neither ate nor drank, nor cried out at the beginning of life?' The Prophet said: 'This is nothing but the rhyming of the Bedouins.'"⁹⁴

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⁹² *ḥasan*. It is related by al-Tirmidhī 1390 p. 1792; Abū Dāwūd 4566 p. 1558; al-Nasā'ī 4856 p. 2401; Ibn Mājah 2655 p. 2636; Aḥmad 2:189, 215; al-Dāraquṭnī 3:210. al-Tirmidhī said: "It is a *ḥasan ḥadīth*."

⁹³ *ṣaḥīḥ*. It is related by al-Bukhārī, *al-jāmi' al-ṣaḥīḥ*, 6905, 6906 p. 576, Muslim 1683 p. 976, Abū Dāwūd 4570 p. 1559, Ibn Mājah 2640 p. 2636, Aḥmad 4:253.

⁹⁴ *ṣaḥīḥ*. It is related by Aḥmad 4:245, 246, 249; Muslim 1682 p. 975; Abū Dāwūd 4568 p. 1558; al-Tirmidhī 1411 p. 1794; al-Nasā'ī 4825 p. 2400; al-Dāraquṭnī 3:197-198. Aḥmad also, related another transmission from Abū Hurayrah 2:274, 438, 498.

5.1 THE SWEARING OF OATHS IN CASES OF MURDER

[Issue 21] The swearing of an oath is begun by the oath of the plaintiffs

Abū Ḥanīfah said it is begun with the oath of the defendants.

- [48] (Al-Bukhārī and Muslim): al-Layth from Yaḥyā b. Sa'īd from Bushayr b. Yasār from Sahl b. Abī Ḥathmah: “ ‘Abd Allah b. Sahl and Muḥayyiṣah b. Mas'ūd left Madīnah and found themselves at Khaybar. They then split up. Then Muḥayyiṣah found ‘Abd Allah murdered so he buried him. He then went to the Messenger of Allah along with Ḥuwayyiṣah b. Mas'ūd and ‘Abd al-Raḥmān b. Sahl. Muḥayyiṣah was the youngest of them but he began to speak before his two companions. The Prophet said: ‘Let the oldest speak.’ So Muḥayyiṣah was silent and his two companions spoke. Muḥayyiṣah then spoke with them and they mentioned the murder of ‘Abd Allah b. Sahl. The Prophet said: ‘Will you swear 50 oaths so that you can receive your right to kill the murderer.’ They said: ‘How can we swear when we did not witness the killing?’ The Prophet said: ‘Then the Jews can prove their innocence

with 50 oaths. They said: 'How can we accept the oath of a disbelieving people?' When the Prophet heard this he paid up the blood money."⁹⁵

Those who disagree say that in the authenticated traditions it is recorded differently.

- [49] (Al-Bukhārī): Abū Nu'aym relates from Sa'īd b. 'Ubayd that Bashīr b. Yasār said: "It is claimed that one of the Anṣār called Sahl b. Abī Ḥathmah said that a group of his kin went to Khaybar and there split up. Then one of them was found dead. They informed the Prophet who said: 'Can you bring proof of his murder?' They said: 'We have no evidence.' So the Prophet said: 'Then the Jews will swear.' They said: 'We do not accept the oath of a Jew.' The Prophet did not want to leave his death in vain so he compensated them with one hundred camels from the *zakāt*."⁹⁶

We would say that this is the transmission of Sa'īd b. 'Ubayd, and that our transmission is greater and more appropriate and literally more complete. In your *ḥadīth* there is nothing more than offering the oath to the defendants,

⁹⁵ *ṣaḥīḥ*. It is related by Muslim 1669 p. 971; al-Bukhārī, *al-jāmi' al-ṣaḥīḥ*, 3173 p. 257; Abū Dāwūd 4520 p. 1555; al-Tirmidhī 1422 p. 1795; al-Nasā'ī 4716 p. 2392; Ibn Mājah 2677 p. 2637; Aḥmad 4:2-3; al-Dāraquṭnī 3:108, 110.

which is also in our *ḥadīth*, but after offering it to the plaintiff, so our transmission contains more and is supported by the Prophet's words:

- [50] "The onus of proof is upon the plaintiff and the oath is upon the defendant except in *qasamah*."⁹⁷

[Issue 22] It is not acceptable for a *dhimmī* to change to a religion other than Islam

Abū Ḥanīfah said that he is left alone.

Al-Shāfi'ī has more than one opinion.

- [51] Ayyūb relays from 'Ikrimah from b. 'Abbās that the Messenger of Allah said: "If anyone changes his religion, kill him."⁹⁸

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⁹⁶ *ṣaḥīḥ*. It is related by al-Bukhārī, *al-jāmi' al-ṣaḥīḥ*, 6898 p. 575; Abū Dāwūd 4523 p. 1555; al-Nasā'ī 4723 p. 2393.

⁹⁷ *ḍa'if*. It is related by al-Dāraqūṭnī, 3:110, 111; 4:218 from Muslim b. Khālīd al-Zanjī, from Ibn Jurayj, from 'Aṭā', from Abū Hurayrah. Ibn al-Jawzī mentioned the *ḥadīth* in his *al-Taḥqīq*, 2:388 and said that Muslim b. Khālīd is *ḍa'if*. I would add that Ibn Jurayj is also well known as a *mudallis*. See Ibn Ḥajar, *al-Talkhīṣ al-ḥabīr*, 4:208; al-Albānī, *'Irwā' al-ghalīl*, 8:267. It is worth mentioning that there is an authentic version of the *ḥadīth*. It is related from Ibn Abī Mulaykah that Ibn 'Abbās wrote to him: "The Prophet decreed that the oath is upon the defendant." It is related by al-Bukhārī, *al-jāmi' al-ṣaḥīḥ*, 2668 p. 212; Muslim 1711 p. 981; Abū Dāwūd 3619 p. 1491; al-Tirmidhī 1341 p. 1786; Ibn Mājah 2321 p. 2615. al-Tirmidhī said: "This *ḥadīth* is *ḥasan* and *ṣaḥīḥ*. The people of

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[Issue 23] It is not permissible to pursue and kill rebels (*bughāh*) or their wounded

Abū Ḥanīfah said: if they have a platoon it is allowed.

- [52] From ‘Abd Al-‘Azīz al-Darāwardī from Ja‘far b. Muhammad from his father from ‘Alī b. Ḥusayn from Marwān b. al-Ḥakam: “One of ‘Ali’s men shouted on the day of the battle of the Jamal: ‘No retreater is to be killed nor any wounded person and whoever locks his door is safe and whoever throws down his eapon is safe.’”⁹⁹

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knowledge amongst the Companions and others are acted upon that the onus of proof is upon the plaintiff and the oath is upon the defendant.”

⁹⁸ *ṣaḥīḥ*. It is related by Aḥmad 1:217, 282-283, 322; al-Bukhārī, *al-jāmi‘ al-ṣaḥīḥ*, 6922 p. 577; Abū Dāwūd 4351 p. 1540; al-Tirmidhī 1458 p. 1800; al-Nasā’ī 4065 p. 2353; Ibn Mājah 2535 p. 2629; al-Dāraquṭnī 3:108, 113, all from Ibn ‘Abbās. Aḥmad also, related it from Mu‘ādh b. Jabal. See *al-Musnad*, 5:231.

⁹⁹ *mawqūf*. It is part of a lengthy *ḥadīth* related by Sa‘īd b. Manṣūr 2: 237. See also al-Bayhaqī, *al-Sunan al-kubrā*, 8:181; ‘Abd al-Razzāq, *al-Muṣannaf*, 10:123.

CHAPTER 6: THE PRESCRIBED PUNISHMENTS (*AL-HUDŪD*)

6.1 THE PURPOSE OF PRESCRIBED LEGAL PENALTIES

Allah Almighty has created the human being, and given him attributes, some good and some bad. He has given him an inclination towards good and an inclination towards evil and placed in him attributes of injustice and enmity: "Man is indeed wrongdoing, ungrateful."¹, "Man took it on [i.e. the trust which is all the duties that Allah has ordained]. He is indeed wrongdoing and ignorant".² Mankind's nature is to love the temporal and to disregard the life to come: "No indeed! But you love this fleeting world and you disregard the '*ākhirah*.'"³; and to love wealth and worldly desires: "To mankind the love of worldly appetites is painted in glowing colours: women and children, and heaped up mounds of gold and silver and horses with fine markings, and livestock and fertile farmland."⁴ It is a mercy and a justice from Allah to His bondsmen that He has shown them the ways of goodness and has placed in their natures and their minds the knowledge of what will benefit them and what will harm them, and has enabled them to overcome and refine their own selves and lead them to those things which will benefit them and take them away from those things which will harm them through the intellect with which He has favoured them over all living things. Not only this but He has also explained to them what is beneficial and

¹ *Ibrāhīm* 14: 36.

² *Al-Aḥzāb* 33: 72.

³ *Al-Qiyāmah* 75:19

⁴ '*Āl 'Imrān* 3:14.

what is harmful and where the best of this life and the next is to be found through His apostles. His Sacred Laws contain commands for every good and prohibitions from every evil. However, there is no escape from the evil consequences of human nature such as competition, mutual envy, following the call of the base desires, anger, transgressing all bounds, and falling short of obligations. Therefore, Allah has laid down punishments (*ḥudūd*) to be preventative and rehabilitative. They are preventative in that they prevent a person from injuring himself and others, and prevent others from following the ways of the wrongdoers and the transgressors. These punishments also restore the deficiency that a person falls into other than the crime of *shirk* (polytheism) and cleanse him of the filth of disobedience. In the noble *ḥadīth* which affirms that the prophet says that: "If anyone commits any of these crimes and is punished for them in this world it is expiation for him."⁵

Attributing authority to Allah is enough to establish His far-reaching wisdom, for Allah is All Wise, All Knowing. As regards comprehending the wisdom of every command and prohibition in detail, the human intellect may at times be able to do so and at other times be unable to do so in matters for which there are no revealed texts. There is no doubt, though, that no command nor prohibition in the Sacred Islamic Law is devoid of wisdom and great purpose, which is the realisation of the common good of the bondsmen in this world and the next. In every order there is the good of

⁵ It is part of a *ḥadīth* related by al-Bukhārī no.3892 p. 316; and Muslim no.1709 p. 980. Both from 'Uḇādah b. al-Ṣāmit. It known as the *ḥadīth* of *bay'at al-nisā'* (women's pledge.)

both worlds or of one of them. In every prohibited act there is the corruption of both worlds or of one of them. The Islamic religion is based upon this great principle – the principle of attaining the common good and avoiding corruption. The jurists in Islamic law have deduced many laws for which there was no specific evidence based on this principle which is confirmed by a healthy mind. No person of sound mind is able to deny that attaining that which is purely for the common interest and avoiding that which contains pure corruption is something laudable and to be commended. If different interests conflict then the highest of them should be sought. The opposite is the case for corruption, where the lesser of two evils should be sought. It is exactly as doctors treat their patients, when one limb of the person may be amputated in order to save the rest of the body. This is something agreed upon by all the sages. The legalisation of penalties and punishments is the same idea; it is a protection for the souls, bodies, honour, wealth, and minds of the people from anyone of weak faith or overcome by base desires, or corruption or injustice or enmity who may trespass against them. There is no doubt amongst people of intellect and in all the Sacred Laws and man-made laws that deterring wrongdoers and criminals and preventing them from harming others and punishing them for doing so is necessary, otherwise the people would destroy each other and the world would fall into corruption. It is also undisputed that the punishment, in order to be effective, must be painful otherwise it cannot be rightly called a punishment. As an example let us take some of the punishments stipulated in the Sacred Law of Islam and examine the benefit in them and compare them with other, man-made laws.

(I.) THE PUNISHMENT FOR KILLING

Killing has been made legal in the law of Islam as a punishment for the crime of killing if it has been committed by a person of the age of reason, of sound mind, and deliberately and unlawfully against another person. If this preventative punishment were not the case, then everyone would take it upon himself to exact revenge by killing whoever has harmed him or transgressed against him even in simple matters like insults or beating. If it is argued that the punishment for killing is killing and this is like one who tries to wipe out filth with filth, it should be said that the crime of killing against a person is not a specific crime but is a general crime. This is because the person who commits a crime against a person by destroying him unlawfully has exposed the whole of society to killing by encouraging others to do the same. This will lead to a widespread fear amongst society. People will concern themselves with thinking about defending themselves and protecting themselves in different ways or will flee, seeking a safer and more stable place. This can have the effect of political, economic, and social downfall as is clear to anyone of sound mind. Because of this Allah has said: "So We decreed for the tribe of Israel that if someone kills another person -unless it is in retaliation for someone else or for causing corruption in the earth- it is as if he had murdered all mankind. And if anyone gives life to another person, it is as if he had given life to all mankind."⁶ Allah also says: "There is life for

⁶ *Al-Mā'idah* 5:32.

you in retaliation, people of intelligence, so that hopefully you will have *taqwā*.”⁷ In fact, *qiṣās* is not like wiping out filth with filth but it is cleansing of filth. Retaliation is a purification for society from crime, and a purification for the relatives of the victim from resentment and hatred and from trying to extract revenge from the killer which may cause internecine wars in which many innocent people are killed. Retaliation is also a purification for the killer from his sin. These are all benefits for the individual, society and the state and are greater than the harm which may result from killing the killer.

(II.) THE CRIME OF ADULTERY

The crime of adultery carries the punishment of death. This is if the adulterer is of the age of reason, of sound mind, and has been married. The punishment will not be carried out upon him unless he confesses himself and by his own free will and without coercion and does not retract that confession until the punishment is carried out. If he retracts for one moment before that, the punishment will be voided. On the other hand if four just witnesses testify against him that they saw him commit this crime and identify him clearly, the punishment of death will be carried out on him. Adultery, even if the two parties obtain satisfaction from it, is a foul crime and a compliance to the call of base desires which goes against healthy human nature and intellect and opposes the divine way which is marriage. It is a kind of murder; the

⁷ *Al-Baqarah* 2:178.

murder of virtue, chastity and nobility. It leads to killing in that many of the instances of murder that are committed in Muslim and non-Muslim societies are caused by this crime where the husband or the lover kill the wife or lover when the crime is discovered. It is of the mercy of Allah that he has lessened the punishment for non-married people taking into consideration the various reasons and motivations behind their crime. He has made the punishment for them one hundred lashes and *taghrīb* (banishment) for a year.⁸

(III.) APOSTASY

Apostasy is the third crime which carries the punishment of death. This is despite the fact that the non-Muslims have a choice between accepting Islam and paying the *jizyah* (poll tax) and living under the government of Muslims. This is because many non-Muslims are diverted from following Islam by emulating their forefathers and their leaders. If these prohibiting factors are no longer there and the non-Muslim sees Islam practically implemented in real life this would motivate them to enter Islam, for Allah has given the people a natural love for truth. It is related in the *qudsī ḥadīth* that Allah says: "I created My slaves *ḥunafā'* [i.e. people of pure natural belief in Allah] all of them, then Satan misled them."⁹ If a Muslim becomes an apostate his act of apostasy is seen as a crime against the religion which is greater than a crime

⁸ See El-Awa M.S., *Punishment In Islamic Law*, p. 18-20.

⁹ *ṣaḥīḥ*. It is a part of a *ḥadīth* related by Muslim 2865 p.1174 from 'Iyāḍ al-Mujāshi'ī.

against the person. He should be offered the chance to repent but if he refuses he should be killed to preserve the sacred things of the society and its morals from those who take them lightly.

It is clear from what has preceded that, the Islamic Law while respects the humanity of the individual human being, and his right to life and his freedom of belief and other rights, the common interests of society is given precedence over the individual. This is something which is confirmed by humanity in theory, but in practice in their man-made laws they are not consistent; at times they give the common good precedence and at other times they give precedence to specific interests. This is the way of all those who do not follow the guidance of Allah.

[Issue 24] Both flogging and stoning are carried out on a *muḥṣan*

Dawūd said that this was the case.

Aḥmad, like most scholars said they are not both carried out.

[53] (Muslim): Ibn Abī ‘Arūbah, from Qatādah, from al-Ḥasan, from Ḥittān b. ‘Abd Allah al-Raqāshī, that ‘Ubādah b. al-Ṣāmit said: when revelation descended upon him, The Messenger of Allah used to become intensely distressed and because of this his face would become ashen. One day Allah sent down revelation upon him and when the Prophet had regained his composure he said: ‘Take heed, Allah has made a way for women. Those

who have been married with those who have been married and those who have not been married with those who have not been married: for those who have been married there is [the penalty of] a hundred lashes and stoning; for those who have not been married there is [the penalty of] a hundred lashes and a banishment for a year.”¹⁰

[54] Aḥmad relates from Wakī‘, from al-Faḍl b. Dalham, from al-Ḥasan, from Qabīṣa b. Ḥurayth, from Salamah b. al-Muḥabbaq that the Messenger of Allah said: “Take heed! Take heed! Allah has made a way for women: Those who have not been married with those who have not been married there is [the penalty of] 100 lashes and banishment for a year; for those who have not been married with those who have not been married there is [the penalty of] 100 lashes and stoning.”¹¹

[55] Aḥmad relates from Ḥusayn b. Muḥammad, from Sa‘īd, from Salama and Mujālid who both heard al-Sha‘bī say: “‘Alī, when he stoned the woman from Kūfa, beat her on the Thursday and stoned her on the Friday and said:

¹⁰ *ṣaḥīḥ*. It was related by Aḥmad 5:318, 320; Muslim in *al-Ḥudūd*; Chapter ‘*Ḥadd* of adultery’ 1690 p. 977; Abū Dāwūd 4415 p. 1545; al-Tirmidhī 1434 p. 1797; Ibn Mājah 2550 p. 2630.

¹¹ *ṣaḥīḥ*. It was related by Aḥmad 3:476; 5:313, 317, 318, 320, 327; Abū Dāwūd 4417 p. 1545. This is another version of *ḥadīth* 52.

'I beat her by the authority of the book of Allah and stoned her by the authority of the *sunnah* of the Prophet of Allah."¹²

[Issue 25] Islam is not a condition for *iḥṣān*

Abū Ḥanīfah and Mālik said it is a condition.

[56] Sharīk relates from Simāk from Jābir b. Samurah who said: "The Prophet stoned a Jew and a Jewess."¹³

[57] Mālik relates from Nāfi' from Ibn 'Umar: "The Messenger of Allah stoned a Jew and a Jewess."¹⁴

The other schools mention:

[58] Abū Bakr b. Abī Maryam relates from 'Alī b. Abī Ṭalḥah that Ka'b b. Mālik wanted to marry a Jewess or a Christian woman so he asked the

¹² *ṣaḥīḥ*. It was related by Aḥmad 1:94, 108, al-Bukhārī, *al-jāmi' al-ṣaḥīḥ*, 6812 p. 568; al-Dāraqutnī 3:123-124. See also Ibn Ḥajar, *Fatḥ al-Bārī*, 12:118-119.

¹³ *ṣaḥīḥ*. It was related by Aḥmad 5:91-92, 94, 97, 104. There are other transmissions from other Companions such as al-Barā' b. 'Āzib and Abū Hurayrah. See Abū Dāwūd 4447 p. 1548; 4451 p. 1549; al-Tirmidhī 1437 p. 1798; Ibn Mājah 2557 p. 2630 and the following *ḥadīth*.

¹⁴ *ṣaḥīḥ*. It was related by al-Tirmidhī 1436 p. 1798; al-Bukhārī, *al-jāmi' al-ṣaḥīḥ*, 6841 p. 571 and 6819 p. 568; Muslim 1699 p. 979; Abū Dāwūd 4446 p. 1548; Ibn Mājah 2556 p. 2630; Aḥmad 2:5, 17, 62, 63, 76, 126.

Prophet and he forbade him from it saying: "She will not make you *muḥṣan*."¹⁵

Ibn Abī Maryam is *wāḥī*, and Ibn Abī Ṭalḥah never met Ka'b.

- [59] Ishāq b. Rāhawayh relates from 'Abd al-'Azīz b. Muḥammad from 'Ubayd Allah from Nāfi' from Ibn 'Umar that the Prophet said: "Whoever assigns partners with Allah will not make you *muḥṣan*."¹⁶

We [i.e. Ibn al-Jawzī] would say: Ishāq withdrew *al-raf'* of this *ḥadīth* so the correct form is *mawqūf*.

- [Issue 26] The blood money for wounding a woman is equal to that of man in cases where it is less than a third of the blood money. If it reaches a third then it is half the blood money of a man.

From Aḥmad also that it equals it.

¹⁵ *ḍa'īf*. It was related by al-Dāraquṭnī 3:148; Ibn Abī Shaybah Abū Bakr 'Abd Allah b. Muḥammad, *al-Muṣannaḥ*, 5:531; Sa'īd b. Manṣūr 1:193 no. 715; al-Bayhaqī, *al-Sunan al-kubrā*, 8:216; al-Ṭabarānī, *al-Mu'jam al-Kabīr*, 19: 103; Ibn 'Adī, *al-Kāmil*, 2:39.

¹⁶ *ḍa'īf*. It was related by al-Dāraquṭnī 3:147; al-Bayhaqī, *al-Sunan al-kubrā*, 8:216. In the *isnād* there is 'Abd al-'Azīz b. Muḥammad al-Drāwardī. Imam Aḥmad and al-Nasā'ī both weakened his transmissions from 'Ubayd Allah al-'Umarī and this is one of them. Moreover, it contradicts what is firmly established from Ibn 'Umar that the Prophet stoned a Jew and a Jewess. See *ḥadīths* 55, 56; al-Bayhaqī, *ma'rifat al-sunan wa al-'Āthār*, 6:324; al-Zayla'ī, *Naṣb al-rāyāh*, 3:327-328; al-Albānī, *Silsilah al-aḥādīth al-ḍa'īfah*, no. 717.

Abū Ḥanīfah, and al-Shāfi'ī in his later view said: It is a half in all cases.

- [60] (al-Nasā'ī): Ismā'īl b. 'Ayyāsh, from Ibn Jurayj, from 'Amr b. Shu'ayb, from his father from his grandfather that the Messenger of Allah said: "The blood money for a woman is the same as that for a man until it reaches a third of the full blood money for her."¹⁷

I [i.e. al-Dhahabī] say that Ismā'īl is *ḍa'īf* when he relates from narrators of the Ḥijāz.

- [61] Hushaym, from Ash'ath b. 'Abd al-Malik, from al-Ḥasan and Muḥammad, who both said: "Blood money for intentional killing is equal for men and woman up to a third of the full blood money."¹⁸

- [62] Zakarīyyā, and others, from al-Sha'bī that 'Alī said: "Wounded women have one half of the full blood money of the man be the amount large or small."¹⁹

¹⁷ *ḍa'īf*. It was related by al-Nasā'ī in *al-qasāmah*; Chapter 'Blood money for a woman' 4809 p.2399; al-Dāraquṭnī 3:91.

¹⁸ *maqṭū'*. Ibn al-Jawzī picked this legal opinion from the missing part of *al-Sunan* of Sa'īd b. Mansūr. Unfortunately, I did not find it in any other *ḥadīth* sources.

[Issue 27] The blood money for a *dhimmī* killed intentionally by a Muslim is the same as that for a Muslim. If he is killed by mistake then it is one half.

From Aḥmad also that it is a third [by mistake], and that the blood money for a Magian is 800 dirhams.

Abū Ḥanīfah said that the blood money for an unbeliever is the same of a Muslim in both cases. Mālik said that it is half.

Al-Shāfi'ī said that it is a third for both intentional and non-intentional killing and for a Magian he is of the same opinion as us [i.e. Ḥanbalī school].

Our *ḥadīth* evidence:

[63] 'Alī b. al-Ja'd, from Abū Kurz al-Qurashī, from Nāfi', from Ibn 'Umar that the Prophet said: "The full blood money for a *dhimmī* is the same as that of a Muslim."²⁰

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¹⁹ *mun'aḥḥ*. It was related by al-Bayhaqī, *al-Sunan al-kubrā*, 8:95-96 from al-Sha'bī, from 'Alī. 'Abd al-Razzāq al-Ṣan'ānī also, related the *ḥadīth* in *al-Muṣannaḥ*, 9:397 from Ibrāhīm al-Nakha'ī, from 'Alī. Both al-Sha'bī and Ibrāhīm did not hear from 'Alī so it is *munqaṭi'* (disconnected.) see also, al-Zayla'ī, *Naṣḥ al-rāyḥ*, 4:363, al-Albānī, *'Irwā' al-ghalīl fī takhrīg aḥādīth Manār al-sabīl*, 7:306-307.

²⁰ *ḍa'īf jiddan* (very weak). It was related by al-Dāraquṭnī 3:145; al-Bayhaqī, *al-Sunan al-kubrā*, 8:102. Al-Dāraquṭnī said that Abū Kurz is the sole narrator for this *ḥadīth* and he is *matrūk* (very weak). The same was reported from Ibn Ḥibbān. See Ibn al-Jawzī, *al-Taḥqīq*, 2:326.

Ibn Ḥabbān said: It is not licit to argue using Abū Kurz, whose full name is 'Abd Allah b. 'Abd al-Malik b. Kurz.²¹

- [64] Abū Bakr b. 'Ayyāsh, from Abū Sa'd, from 'Ikrimah that Ibn 'Abbās said: "The Messenger of Allah made the full blood money for the two people from the tribe of 'Āmir equal to that of a Muslim."²² Abū Bakr [i.e. Ibn 'Ayyāsh] said: "They both had treaty [with the Prophet]."

Abū Sa'd, who is Sa'īd b. al-Mirzibān, is *wāhi*.²³

- [65] 'Uthmān al-Waqqāṣī, from al-Zuhrī, from 'Alī b. al-Ḥusayn, from 'Amr b. 'Uthmān, from Usāmah: "The Messenger of Allah made the full blood money for a covenanter equal to that of a Muslim."²⁴

'Uthmān is *matrūk*. al-Dāraqutnī related them [i.e. the last three *ḥadīths*]

The other schools argue, in the case of the unintentional killing of a *dhimmī*, using the *ḥadīth* related by:

²¹ In *Sunan al-Dāraqutnī*, 3:145: ' 'Abd Allah b. 'Abd al-Malik al-Fihri.'

²² *ḍa'if jiddan* (very weak). It was related by al-Dāraqutnī 3:171; al-Tirmidhī 1404 p. 1793; al-Bayhaqī, *al-Sunan al-kubrā*, 8:102.

²³ He also was *mudallis*. See Ibn Ḥajar, *Taqrīb al-Tahdhīb*, p387.

²⁴ *ḍa'if jiddan* (very weak). It was related by al-Dāraqutnī 3:145.

[66] Muḥammad b. Ishāq, from 'Amr b. Shu'ayb, from his father from his grandfather that the Prophet said: "The full blood money for a nonbeliever is one half of that of a Muslim."²⁵

[67] Muḥammad b. Rāshid relates from Sulaymān, from 'Amr b. Shu'ayb, from his father, from his grandfather: "The Messenger of Allah decreed that the full blood money for the People of the two Books was to be one half of that of a Muslim."²⁶

This is understood to be for unintentional killing.

Aḥmad relates these two *ḥadīths*.

[68] Zā'idah, from Manṣūr, from Thābit Abū al-Miqdām that Sa'īd b. al-Musayyib said: " 'Umar made the full blood money for a Jew and a Christian four thousand [i.e. dirhams] and for a Magian 800."²⁷

²⁵ *ḥasan*. It was related by Aḥmad 2:180, 215; al-Tirmidhī 1413 p. 1794; al-Dāraquṭnī 3:171. Abū Dāwūd also, related the *ḥadīth*, 4583 p. 1559 but in another version, which is "The full blood money for a *dhimmi* is one half of that of a free man [i.e. Muslim]. al-Tirmidhī said: "This is a *ḥasan ḥadīth*." see also, al-Albānī, *'Irwā' al-ghalīl fī takhrīg aḥādīth Manār al-sabīl*, 7:307.

²⁶ *ṣaḥīḥ*. It was related by Aḥmad 2:183; al-Nasā'ī 4810 p. 2399; Ibn Mājah 2644 p. 2636; al-Dāraquṭnī 3:171; 3:145.

²⁷ *munqaṭi'*. It was related by al-Dāraquṭnī 3:170, 130, 131; al-Shāfi'ī as in *Badā'i' al-minan fī tartīb Musnad al-Shāfi'ī wa al-Sunan*, 2:183; al-Bayhaqī, *al-Sunan al-kubrā*, 8:100. 'Abd al-Razzāq al-Ṣan'ānī also related the *ḥadīth*, *al-Muṣannaf*, 6:127; 10:93 without mentioning the phrase regarding the full blood money for a Magian.

[Issue 28] The value of a slave if killed by mistake is upon the killer, and the same applies to blood money for his limbs

Abū Ḥanīfah said that the blood relatives are liable rather than of the perpetrator, but injury to limbs is his liability.

Al-Shāfi'ī is of our opinion.

Also from al-Shāfi'ī that both penalties devolves upon the perpetrator's family (*al-‘āqilah*).

[69] Wakī', from 'Abd al-Malik b. Ḥusayn al-Nakha'ī, from 'Abd Allah b. Abī al-Safar, from 'Āmir that 'Umar said: "Blood money for intentional killing, the killing of a slave, *ṣulḥ* and confession is not subject to the blood money of the relatives (*al-‘āqilah*)."²⁸

[Issue 29] The homosexual act warrants the *ḥadd* punishment

Abū Ḥanīfah said: it warrants exemplary *ta'zīr* punishment.

²⁸ *ḍa'if jiddan*. It was related by al-Dāraquṭnī 3:177; al-Bayhaqī, *al-Sunan al-kubrā*, 8:104. In addition to the disconnection between al-Sha'bī and 'Umar, in *isnād* there is al-Nakha'ī 'Abd al-Malik b. Ḥsayn who is *matrūk*. See Ibn Ḥajar al-'Asqalānī, *Taqrīb al-Tahdhīb*, p.1199-1200 and *al-Talkhīṣ al-ḥabīr*, 4:31; al-Zayla'ī, *Naṣb al-rāyah*, 4:379; al-Albānī, *'Irwā' al-ghalīl fī takhrīg aḥādīth Manār al-sabīl*, 7:336-337.

- [70] Aḥmad, from Abū al-Qāsim b. Abī al-Zinād, from Ibn Abī Ḥabīb, and Dawūd b. al-Huṣayn, from 'Ikrimah, from Ibn 'Abbās that the Messenger of Allah said: "Kill both the active and the passive participant in the homosexual act, kill the animal and the person who has sex with it, and kill the person who commits incest."²⁹
- I [i.e. al-Dhahabī] say: Ibn Ma'īn said of Abū al-Qāsim that there is nothing wrong about him (*laysa bihi ba's*).

It is a fact in Islamic law that homosexuality is one of the greatest sins. According to Islamic law, it is as prohibited as adultery is prohibited or with even stronger prohibition. This matter is agreed upon among all Muslims scholars. It is based on evidence from the Qur'ān, authentic *ḥādīths* and consensus³⁰. Allah says: "And Lūṭ, when he said to his people: do you commit an obscenity not perpetrated before you by anyone in all the worlds? You come with lust to men instead of women. You are indeed a depraved people."³¹ It is also related from Jābir b. 'Abd Allah that the Prophet said: "The thing that I fear the most for you is those who do the same as the

²⁹ *ṣaḥīḥ*. It was related by Aḥmad 1:300; Abū Dāwūd 4462 p. 1549; al-Tirmidhī 1456 p. 1800; Ibn Mājah 2561 p. 2630; al-Dāraqutnī 3:126; al-Ḥākim Muḥammad b. 'Abd Allah, *al-Mustadrak*, 4:355. al-Ḥākim stated as well as al-Dhahabī that it is a *ṣaḥīḥ ḥadīth*.

³⁰ See Ibn Hubayrah Yaḥyā b. Muḥammad al-Ḥanbalī (d. 560/1164), *al-'Ifṣāḥ 'an ma'ānī al-ṣiḥāḥ*, 2:238.

³¹ *al-A'rāf*, 7:79-80.

People of Lūṭ [i.e. homosexuality].”³² However, scholars differ in its punishment into two main views:

1. The Homosexual act warrants the *ḥadd* punishment. This is the view held by the majority of jurists, i.e. the Malikīs, Shāfi‘īs and Ḥanbalīs.³³ But they differ again regarding the way it should be carried out. This is due to variety of versions related from different Companions such as:

(i) Ibn ‘Abbās said regarding a *bikr* (male or female who is not married) who is found in an act of sodomy: “He should be stoned.”³⁴ A fortiori a *muḥṣan* (a married adulterer) should be stoned. This is because Allah stoned the People of Lūṭ and the stoning of the sodomite was made legal to resemble the stoning of the People of Lūṭ. It is also related from ‘Alī b. Abī Ṭālib that he stoned a sodomite.³⁵ Hence, the two sodomites should be stoned whether they are freemen or bondsmen, or whether one of them was the slave of another and as long as they have reached the age of maturity. If one of them has not reached the age of maturity then he should be punished with a punishment less than death. Only he who has reached maturity is to be stoned. Ibn Taymiyyah says: “The correct opinion upon which the Prophetic Companions agreed is that both parties should be killed whether they are married or

³² This is related by Aḥmad, 3:382, al-Tirmidhī, 1457, p. 1800, and al-Ḥākim Muḥammad b. ‘Abd Allah, *al-Mustadrak*, 4:357 saying it is *ṣaḥīḥ* and al-Dhahabī agreed with him.

³³ See Ibn Qudāmah ‘Abd Allah b. Aḥmad, *al-Mughnī*, 12:348-350.

³⁴ Abū Dāwūd, 4463 p.1549; and al-Nasā’ī, *al-Sunan al-Kubrā*, 4:322.

³⁵ This is related by Ibn Abī Shaybah Abū Bakr ‘Abd Allah b. Muḥammad, *al-Muṣannaf*, 5:493. ‘Abd al-Razzāq al-Ṣan‘ānī, *al-Muṣannaf*, 7:363.

not. The Prophetic Companions did not disagree in the matter of killing the sodomite but they differed in the way it should be carried out.”³⁶

(ii) A Sodomite should be burned. It is related that Abū Bakr ordered a sodomite to be burned. This was in presence of ‘Alī b. Abī Ṭālib and other Companions.³⁷

(iii) Others relate that a sodomite should be taken to the highest wall in the city and thrown from it and then stoned.³⁸ Which is the same as Allah did with the People of Lūṭ. This is also related from Ibn ‘Abbās.

(iv) Some scholars say that the punishment for it is the same as for adultery, in that a married person is to be stoned and an unmarried person is to be flogged 100 lashes. This is one of two versions from Aḥmad and al-Shāfi‘ī. They say that both adultery and homosexuality are named in Qur’ān as obscenity and both are similar in their definition, which is the illegal insertion of a genital organ into another naturally desired one (*ilāj farjin fī farj, mushtahan ṭab‘an*).³⁹

³⁶ Ibn Taymiyyah Aḥmad b. ‘Abd al-Ḥalīm, *al-Siyāsah al-Shar‘iyyah*, p.138.

³⁷ It was related by al-Bayhaqī, *al-Sunan al-kubrā*, 8:232. It is *ḍaḥīf*. Ibn Ḥajar said: “If it is *ṣaḥīḥ* it would be a conclusive evidence.” *Al-Dirāyah fī takhrīj aḥādīth al-Hidāyah*, See also, al-Zayla‘ī ‘Abd Allah b. Yūsuf, *Naṣb al-Rāyah*, 3:342.

³⁸ This is related by Ibn Abī Shaybah Abū Bakr ‘Abd Allah b. Muḥammad, *al-Muṣannaḥ*, 5:493. And al-Bayhaqī, *al-Sunan al-kubrā*, 8:232.

³⁹ See Ibn Qudāmah, *al-Mughnī*, 12:348-350. Ibn al-‘Arabī Muḥammad b. ‘Abd Allah, *Aḥkām al-Qur’ān*, 2:786. *Ma‘ālim al-qurbah fī ma‘ālim al-ḥisbah*: p.187; Cambridge.

2. The Other group of jurists say that the homosexual act warrants an exemplary *ta'zīr* punishment. This is the view of Abū Ḥanīfah⁴⁰ and the Zāhiri school of law⁴¹. They consider all *ḥadīths* regarding killing sodomites as weak *ḥadīths*. In addition, the Zāhirīs do not believe in *qiyās* and the Ḥanafīs do not use *qiyās* with regard to *ḥudūd* punishments. This is in opposition to the majority of jurists from other schools of law who apply *qiyās* even to *ḥudūd*.⁴²

In conclusion we would say that sodomy, with one accord, is an indecency and a vile crime. All Muslim scholars and the divine religions as well as sound human nature agree upon this.⁴³ The scholars amongst the Companions agreed that both the active and the passive participant in an act of sodomy should be killed, although a dispute arose amongst them as to how they should be killed. The opinion that sodomy warrants a mere exemplary punishment (*ta'zīr*) is a weak opinion. The same goes for the opinions about the methods of killing, like the opinion of killing by rubble or by throwing from a high place, etc. These opinions are nothing but individual judgments, which have no authentic evidence to support them. They are also in contradiction to the principles of Islam which are based upon mercy even in the killing of animals, let alone the killing of a human being. The *ḥadīths* are found to

⁴⁰ See al-Sarakhsī Muḥammad b. Aḥmad, *al-Mabṣūṭ*, 9:77.

⁴¹ See Ibn Ḥazm, *al-Muḥallā*, 11:385.

⁴² See al-Ṭūfī Sulaymān b. 'Abd al-Qawī, *Sharḥ Mukhtaṣar al-Rawḍah*, 3:450 ff.

⁴³ See: *The Jewish Encyclopaedia*, vol.1, under 'Adultery' and vol.3 under 'Capital Punishment'. al-Bukhārī, 6841 p. 571.

support the killing of the perpetrator of this crime of sodomy, and he is to be killed as in the rest of the mandatory punishments by a blow of the sword.

[Issue 30] Having sex with an animal warrants the *ḥadd* punishment, as in the *ḥadd* punishment of the one who practices the homosexual act

Also from Aḥmad that it warrants *ta'zīr* punishment as Abū Ḥanīfah and Mālik said.

We have the previous *ḥadīth* and the *ḥadīth* of:

[71] Sulaymān b. Bilāl, from 'Amr b. Abī 'Amr, from 'Ikrimah, from Ibn 'Abbās that the Messenger of Allah said: " Kill the person who has sex with an animal, and kill the animal."⁴⁴

[Issue 31] One who marries incestuously and has incestuous sexual relations warrants the *ḥadd* punishment.⁴⁵

Abū Ḥanīfah said: He warrants *ta'zīr* punishment.

⁴⁴ *ṣaḥīḥ*. It was related by Aḥmad 1:269; Abū Dāwūd 4464 p. 1549; al-Tirmidhī 1455 p. 1800; Ibn Mājah 2564 p. 2630-2631; al-Dāraquṭnī 3:126; al-Ḥākim Muḥammad b. 'Abd Allah, *al-Mustadrak*, 4:355 and stated as well as al-Dhahabī that it is a *ṣaḥīḥ ḥadīth*.

⁴⁵ See Ibn Taymiyyah, *Majmū' al-Fatāwā*, 34:177.

Our evidence is in the aforementioned *ḥadīth*: "Kill the person who commits incest."⁴⁶

- [72] Aḥmad relates from Wakī', from Ḥasan b. Ṣāliḥ, from al-Suddī, from 'Adī b. Thābit that al-Barā' said: "I met my uncle, (meaning Abū Burdah), with a flag in his hand, and I asked him where he was going. He said: "The Messenger of Allah sent me to kill a man who had married his father's wife after him and to confiscate his wealth."⁴⁷

[Issue 32] If a woman permits her husband to have sex with her slave girl and he does so, he is to be beaten 100 lashes

The majority say: his punishment is the same as the *ḥadd* of the adulterer.

- [73] Ibn Abī 'Arūbah relates from Qatādah, from Ḥabīb b. Sālim who ascribes it to al-Nu'mān b. Bashīr with regard to a man whose wife had permitted for him a slave girl, al-Nu'mān b. Bashīr said: "I will judge it by the judgment of the Messenger of Allah: If she permitted him then I will beat

⁴⁶ See *ḥadīth* 70.

⁴⁷ *ṣaḥīḥ*. It was related by Aḥmad 4:292; Abū Dāwūd 4457 p. 1549; al-Tirmidhī 1362 p. 1788; al-Nasā'ī 3333 p. 2303; Ibn Mājah 2607 p. 2633; 'Abd al-Razzāq al-Ṣan'ānī, *al-Muṣannaḥ*, 6:271; al-Dāraquṭnī 3:196.

him 100 lashes, and if she did not permit him I will stone him. He found that she had permitted him so he beat him 100 lashes.”⁴⁸

This was related by Aḥmad, from Yazīd, from Ibn Abī ‘Arūbah.

[Issue 33] If a man confesses to adultery with a woman and she denies it, the *ḥadd* punishment is still carried out upon him

Abū Hanīfah said that it is not carried out.

[74] Aḥmad relates from Ḥusayn b. Muḥammad, from Muslim b. Khālīd, from ‘Abbād⁴⁹ b. Ishāq, from Abū Ḥāzim, from Sahl: “A man who had become a Muslim came to the Messenger of Allah and said that he had committed adultery with such and such a woman. The Prophet sent for her and she denied it so he punished the man and left the woman.”⁵⁰

⁴⁸ *ṣaḥīḥ*. It was related by Aḥmad 4:276-277; Abū Dāwūd 4458 p. 1549; al-Tirmidhī 1451 p. 1799; al-Nasā’ī 3362 p. 2305; Ibn Mājah 2551 p. 2630; al-Ḥākim Muḥammad b. ‘Abd Allah, *al-Mustadrak*, 4:365. al-Ḥākim stated as well as al-Dhahabī that it is a *ṣaḥīḥ ḥadīth*.

⁴⁹ This was his nickname and his name is ‘Abd al-Raḥmān. See Ibn Ḥajar, *al-Taqrīb* pages 480, 570.

⁵⁰ *ḍa‘īf*. It was related by Aḥmad 5:339-340; Abū Dāwūd 4437 p. 1547 and 4466 p. 1550; al-Tirmidhī 1451 p. 1799; al-Dāraquṭnī 3:99; al-Ḥākim Muḥammad b. ‘Abd Allah, *al-Mustadrak*, 4:370. al-Ḥākim stated as well as al-Dhahabī that it is a *ṣaḥīḥ ḥadīth*. I say that this is an error from both al-Ḥākim and al-Dhahabī to the extent that Muslim b. Khālīd al-Zanjī, one of the narrators of the *ḥadīth*, is a weak narrator. Many *ḥadīth*’s experts such as al-Bukhārī, Abū Dāwūd and many others stated this. It is remarkable to say that al-Dhahabī himself is of the same opinion regarding the mentioned narrator. See *Mẓān al-‘itidāl* 5:228 and *al-Kāshif*, 2:258.

Al-Bukharī said that Muslim [Ibn Khālīd] is *munkar al-ḥadīth*.

I [i.e. al-Dhahabī] say that his *shaykh* [i.e. 'Abbād b. Ishāq] is *layyin*.

[Issue 34] The *ḥadd* punishment for adultery is not established by a single confession

This is in opposition to Mālik and al-Shāfi'ī.

In support of our view is the *ḥadīth* of Mā'iz:

[75] Abū 'Awānah, from Simāk, from Sa'īd b. Jubayr, that Ibn 'Abbās said: "The Messenger of Allah met Mā'iz b. Mālik, and said: 'Is it true what I have heard about you?' He said: 'And what was that?' The Prophet said: 'That you fornicated with the slave girl of such and such a family.' He said: 'Yes.' The Prophet asked again until he had testified four times, then ordered that he be stoned."⁵¹

Sharīk agreed with this, albeit in a shorter form.

[76] This is also related by Isrā'īl, from Simāk, as follows: "He confessed to the Prophet twice before the Prophet had him sent away. He then had him

⁵¹ *ṣaḥīḥ*. It was related by Aḥmad 1: 245, 328; Muslim 1693 p. 978; Abū Dāwūd 4425 p. 1546; al-Tirmidhī 1427 p. 1796.

brought back and he confessed twice so that he had confessed four times, so the Prophet ordered that he be stoned.”⁵²

- [77] Aḥmad relates from Aswad b. ‘Āmir, from Isrā’īl, from Jābir, from ‘Āmir, from ‘Abd al-Raḥmān b. Abzā, that Abū Bakr said: “I was sitting with the Prophet when Mā‘iz came and confessed to him so he sent him away, but he confessed once more and the Prophet sent him away. He came again and confessed for a third time but the Prophet sent him away. I [i.e. Abū Bakr] said to him: ‘If you confess a fourth time you will be stoned.’ He did confess a fourth time so he was detained. The Prophet asked about him and was told that only good was known about him so he ordered that he be stoned.”⁵³

I [i.e. al-Dhahabī] say that Jābir is *wāḥī* (very weak).

- [78] Ḥajjāj b. Arṭa’ah relates from ‘Abd al-Malik b. al-Mughīrah, from ‘Abd Allah b. al-Miqdām, from Ibn Shaddād that Abū Dharr said: “We were with the Messenger of Allah when a man came and said that he had committed adultery but the Prophet turned away from him. He repeated this for a

⁵² *ṣaḥīḥ*. It was related by Aḥmad 1:314.

⁵³ *ṣaḥīḥ*. It was related by Aḥmad 1:8.

second third and fourth time until the Prophet gave his command to us so we dug a pit for him and he was stoned.”⁵⁴

- [79] Hishām b. Sa’d relates from Yazīd b. Nu’aym b. Hazzāl⁵⁵ that his father said: “Mā’iz b. Mālik was under the wings of my father when he copulated a slave girl of the neighbourhood. My father ordered him to go to the Messenger of Allah and inform him what he had done so that the Prophet might seek forgiveness for him and seek a way out. He went to the Prophet and said: ‘Oh Messenger of Allah, I have committed adultery, so administer the book of Allah upon me. The Prophet turned away from him until he came for a fourth time, so he said to him: ‘You have stated four times, so with whom did you commit adultery?’ Mā’iz said: ‘With such and such a girl.’ The Prophet said: ‘You bedded her?’ He said: ‘Yes’, ‘Did you have intercourse with her?’ He said: ‘Yes.’ ‘Did you couple with her?’ He said ‘Yes.’ So he ordered that he be stoned. He survived the attack of the stones and rushed out so quickly. He was met by ‘Abd Allah b. ‘Unays who threw a camel's hoof at him and killed him. This he mentioned to the Prophet who said: ‘It would have been better that you had left him so that he might repent and Allah accept his repentance.’ My father, Nu’aym b. Hazzāl narrated to

⁵⁴ *ṣaḥīḥ*. It was related by Aḥmad 5:179.

⁵⁵ Ibn Ḥajar said that he is *maqbul* and his narration from his grandfather is *mursal*. See *al-Taqrīb* p.1084.

me, from his father, that the Messenger of Allah said to him when he saw him: "By Allah, had you covered him with your garment it would have been better than what you did to him."⁵⁶

I [i.e. al-Dhahabī] say that this speech is *mursal*. Aḥmad transmitted the *ḥadīth*s.

- [80] (Muslim): Bashīr b. al-Muhājir relates from ‘Abd Allah b. Buraydah, from his father who said: “I was with the Prophet when Mā‘iz came to him and said: 'I have committed adultery. . . ' The *ḥadīth* includes the words: "So he (the Prophet) gave his command and a pit was dug for him in which he was placed up to his chest, then he ordered the people to stone him. Buraydah said: 'We were talking with some companions of the Prophet of Allah and we agreed that had he (Mā‘iz) stopped after the third confession then the Prophet would not have asked him again but rather he stoned him after the fourth confession.’”⁵⁷

- [81] (Bukhārī and Muslim): ‘Abd al-Raḥmān b. Khālīd, from Ibn Shihāb, from Ibn al-Musayyib, that Abū Hurayrah said: “A man from the tribe of

⁵⁶ *ṣaḥīḥ*. It was related by Aḥmad 5:216-217; Abū Dāwūd 4419 p. 1545; al-Ḥākim Muḥammad b. ‘Abd Allah, *al-Mustadrak*, 4:363. al-Ḥākim stated as well as al-Dhahabī that it is a *ṣaḥīḥ ḥadīth*.

⁵⁷ *ṣaḥīḥ*. This was related by Aḥmad 5:347; and Muslim in *al-Ḥudūd*; Chapter 'One who confesses to adultery' p. 978, no. 1695; Abū Dāwūd 4434 p. 1547; al-Dāraqūṭnī 3:91-92 from Sulaymān b. Buraydah, from his father.

Aslam came to the Prophet and said that he had committed adultery but the Prophet turned away from him, so he approached him again from the side of his face that he had turned towards him and said: 'I have committed adultery. The same thing happened again until he had testified against himself four times. The Prophet called him and said: 'Are you insane?' The man said: 'No, Oh Messenger of Allah.' He said: 'Are you married?' The man said: 'Yes.' So the Prophet said: 'Take him and stone him.'⁵⁸

- [82] (al-Tirmidhī): Muḥammad b. 'Amr, from Abū Salamah, that Abū Hurayrah said: "Mā'iz came to the Messenger of Allah and said that he had committed adultery, so the Prophet turned away from him until when he survived the stones he went his way in a bad condition then the Prophet said: "Why did you not leave him."⁵⁹

⁵⁸ *ṣaḥīḥ*. This was related by al-Bukhārī no.5271 p.455; Muslim no.1691 p.977 in *al-ḥudūd*; Chapter 'The person who confesses to adultery'; Aḥmad 2:453.

⁵⁹ *ṣaḥīḥ*. This was related by al-Tirmidhī 1428 p.1796; Ibn Mājah 2554 p. 2630; Aḥmad 2:450, al-Ḥākim Muḥammad b. 'Abd Allah, *al-Mustadrak*, 4:363. al-Ḥākim stated that it is a *ṣaḥīḥ ḥadīth* and is in accordance with Muslim's stipulation.

[83] The other schools argue using the *ḥadīth* of *al-ʿasīf* [i.e. wage earner] in which it is said: “Go, Oh ʿUnays, to such and such a man’s wife and if she confesses then stone her.”⁶⁰

We [i.e. Ibn al-Jawzī] would say: If she confesses in the acknowledged way with repetition.

[Issue 35] If a person confesses to adultery and then denies it, the *ḥadd* punishment is averted

This is in opposition to Dāwūd and one of two reports from Mālik.

We say that Māʿiz when stoned fled and the Prophet said: “Why did you not leave him?”

⁶⁰ *ṣaḥīḥ*. It was related by al-Bukhārī, 6827, 6842, 7193 p. 569, 571, 600; Muslim 1697 p. 979; Abū Dāwūd 4445 p. 1548; al-Tirmidhī 1433 p. 1797; Ibn Mājah 2549 p. 2630; Aḥmad 4:115-116; Mālik, 2:822. The story is that two men brought a dispute to the Prophet. One of them said: ‘Messenger of Allah, judge between us by the Book of Allah.’ The other, who was the wiser of the two, said: ‘Yes Messenger of Allah, judge between us by the Book of Allah and give me permission to speak.’ The Prophet said: ‘Speak’. He said: ‘My son was hired by this person and he committed fornication with his wife. He told me that my son deserved stoning and I ransomed him for 100 sheep and a slave girl. Then I questioned the people of knowledge and they told me that my son deserved to be flogged with 100 lashes and exiled for a year and they informed me that the woman deserved to be stoned.’ The Prophet said: ‘By Him in whose Hand my self is, I will judge between you by the Book of Allah. As for your sheep and slave girl they could be returned to you. Your son should have 100 lashes and be exiled for a year. He then ordered ʿUnays to go to the wife of the other man ...’ etc.

[Issue 36] A master has the right to carry out the *ḥadd* upon his slave.

This is in opposition to Abū Ḥanīfah.

- [84] Al-Thawrī relates from ‘Abd al-A‘lā al-Tha‘labī, from Abū Jamīlah al-Ṭuḥawī, that ‘Alī said: “A servant girl of the Prophet's was found to have committed fornication, so the Prophet ordered me [i.e. ‘Alī] to carry out the *ḥadd* upon her. I went to her and found that she had not stopped bleeding yet so I went to the Prophet and told him. He said: 'When she has stopped bleeding then carry out the *ḥadd*. Carry out the *ḥudūd* upon those your right hands possess.”⁶¹

This was related by Aḥmad.⁶²

- [85] (al-Tirmidhī): Abū Khālid al-Aḥmar, from al-A‘mash, from Abū Ṣāliḥ, from Abū Hurayrah, that the Messenger of Allah said: “If the servant girl of anyone of you commits fornication, then let him flog her, up to three

⁶¹ *ṣaḥīḥ*. It was related by Aḥmad 1:135, 136, 145; Muslim 1705 p. 980; Abū Dāwūd 4473 p. 1550; al-Tirmidhī 1441 p. 1798; al-Dāraqutnī 3:158.

⁶² In *al-Musnad* no.738.

instances. If she repeats it then let him sell her, even if only for the price of a rope of hair.”⁶³

Al-Tirmidhī said they [i.e. *ḥadīths* 83 and 84] were both *ṣaḥīḥ*.⁶⁴

- [86] (Bukhārī and Muslim): Al-Zuhrī, from ‘Ubayd Allah, from Abū Hurayrah, and Zayd b. Khālīd, and Shibl said that: “The Messenger of Allah was asked about a slave girl who commits fornication and she is not married. He said: ‘Flog her, and if she commits it again, then flog her, and if she commits it again, then flog her, and if she commits it yet again, then sell her, even if only for a rope of hair.’”⁶⁵

⁶³ *ṣaḥīḥ*. It was related by al-Tirmidhī In *al-Ḥudūd*; Chapter ‘Carrying out the *ḥadd* upon servant girls’ 1440 p. 1798; al-Bukhārī, *al-jāmi‘ al-ṣaḥīḥ*, 6839 p. 571; Muslim 1703 p. 979; Abū Dāwūd 4470 p. 1550; Aḥmad 2:376, 422, 431; al-Dāraquṭnī 3:160, 162.

⁶⁴ In *al-Ḥudūd*; Chapter ‘Carrying out the *ḥadd* upon servant girls.’ p.1798; no.1440.

⁶⁵ *ṣaḥīḥ*. It was related by Aḥmad 4:116, 117; al-Bukhārī in *al-Ḥudūd*; Chapter ‘If a servant girl commits adultery.’ no.6837, 6838 p.571; Muslim 1704 p. 980 in *al-Ḥudūd*; Chapter ‘Stoning of the Jews of the *Dhimma* for adultery.’; Ibn Mājah 2565 p. 2631. There is no mention in the *Ṣaḥīḥayn* of Shibl. He appears in the transmission of al-Tirmidhī no.1433. al-Tirmidhī said after relating the *ḥadīth*: “The *ḥadīth* of Abū Hurayrah and Zayd b. Khālīd is *ḥasan* and *ṣaḥīḥ*. Malik b. Anas [*al-Muwatta‘a*’, 347], and Ma‘mar, and others also, related it from al-Zuhrī, from ‘Ubayd Allah b. ‘Abd Allah b. ‘Utbah, from Abū Hurayrah, and Zayd b. Khālīd, that the Prophet said: ‘If a slave girl commits adultery then flog her. If she does so for a fourth time then sell her, even if only for a rope of hair.’ Sufyān b. ‘Uyaynah related from al-Zuhrī, from ‘Ubayd Allah, that Abū Hurayrah, Zayd b. Khālīd, and Shibl all said: ‘We were with the Prophet ...’. This is how Ibn ‘Uyaynah related the two *ḥadīths* from Abū Hurayrah, and Zayd b. Khalid, and Shibl. Sufyān was mistaken in mixing two *ḥadīths* together. The correct version is that related by Muḥammad b. al-Walīd al-Zubaydī, and Yūnis b. ‘Ubayd, and Ibn Akhi al-Zuhrī [i.e. Muḥammad b. ‘Abd Allah b. Muslim al-Zuhrī], from al-Zuhrī, from ‘Ubayd Allah, from Abū Hurayrah, and Zayd b. Khālīd, that the Prophet said : ‘If a slave girl commits adultery then flog her.’ Also al-Zuhrī, from ‘Ubayd Allah, from Shibl b. Khālīd, from ‘Abd Allah b. Mālīk al-Awsī, that the Prophet said: ‘If a slave girl commits adultery...’ This is the correct

[Issue 37] The *ḥadd* for someone who drinks wine is eighty [i.e. stripes].

Also from Aḥmad: forty.

- [87] (al-Tirmidhī): Shu‘ba said that he had heard from Qatādah, that Anas said: “A man who had drunk wine was brought to the Prophet so he beat him with two palm branches about forty times. This Abu Bakr did also. ‘Umar sought consultation on the matter and ‘Abd al-Raḥmān b. ‘Awf said the least *ḥadd* is eighty so ‘Umar went by this.”⁶⁶

The Messenger of Allah did not prescribe a *ḥadd* for this, and if he had he would not have exceeded it. He did beat people as an example and as a punishment up to forty strokes. The *Ṣaḥāba* understood from this that the

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version amongst the scholars of *ḥadīth*. Shibl b. Khālīd did not live at the time of the Prophet Shibl relates the *ḥadīth* from ‘Abd Allah b. Mālīk al-Awsī, from the Prophet which is the correct version. The *ḥadīth* of Ibn ‘Uyaynah is not *maḥfūẓ* [i.e. not correct]. It is related also from Ibn ‘Uyaynah that he said: Shibl b. Ḥāmid, and this is an error because his name is Shibl b. Khālīd also called Shibl b. Khulayd.”

⁶⁶ *Ṣaḥīḥ*. This was related by al-Tirmidhī 1443 p. 1798 in *al-ḥudūd*; Chapter 'Regarding the *ḥadd* of the drunkard.'; Muslim 1706 p. 980; Abū Dāwūd 4479 p. 1551; Aḥmad 3:115, 176, 180, 272; al-Dāraqutnī 3:158 from ‘Abd al-Raḥmān b. Azhar al-Zuhrī from his father. See Ibn Ḥajar al-‘Asqalānī, *al-Iṣābah fī tamyīz al-ṣaḥābah*, 1: 44- 45.

intention was rebuke, and they attached it to the *ḥadd* of slander, which was the way of 'Umar, 'Uthmān, Ibn 'Awf, Ṭalḥah and al-Zubayr.

[Issue 38] During the *ḥudūd*, all the body is hit except the head, the face, and the genitals.

Mālik said: the back and near the back only.

[88] Ibn Abī Laylā relates from 'Adī b. Thābit, that Hunaydah b. Khālīd witnessed 'Alī carry out the *ḥadd* on a man and he said to the *jallād* (the one doing the flogging): 'Beat him and give every member of his body its due but stay away from his face and genitals.'⁶⁷

[Issue 39] The *ḥadd* is not carried out in *dār al-ḥarb* (non-Islamic lands).

This is in opposition to Mālik and al-Shāfi'ī.

⁶⁷ *ḍa'if*. It was related by al-Bayhaqī, *al-Sunan al-kubrā*, 8:327. Ibn Abī Shaybah Abū Bakr 'Abd Allah b. Muḥammad, also related it in *al-Muṣannaf*, 5:524 from Ḥafṣ, from Ibn Abī Laylā, from 'Adī, from al-Muhājir b. 'Umayrah, from 'Alī. This is in opposition to the chain in the original text in which Hunaydah b. Khālīd is mentioned instead of 'Umayrah. The *isnād* is at any consideration *ḍa'if* due to the existence of Ibn Abī laylā Muḥammad b. 'Abd al-Raḥmān who is a weak narrator.

- [89] Ibn Lahī'ah relates from 'Ayyāsh b. 'Abbās, from Shuyaym b. Baytān, from Junādah b. Abī Umayyah, that he said upon the *minbar* in Rudh⁶⁸ when he beat the two men who had stolen the people's booty: "What prevents me from cutting their hands is that Busr b. Arṭa'a found a man who had stolen during a military raid and he beat him and did not cut off his hand, and said: 'The Messenger of Allah forbade us from cutting off hands during raids.'" ⁶⁹

This [*isnād*] contains Ibn Lahī'ah.

- [90] Sa'īd related in his *Sunan*, from Ismā'il b. 'Ayyāsh, from Abū Bakr b. Abī Maryam, from Ḥumayd b. 'Uqbah, that Abū al-Dardā' forbade carrying out the *ḥadd* on a man while on a military raid until he has reached home. This is for fear that rage will overtake him and he will join up with the *kuffār*.⁷⁰

⁶⁸ This is as it is in the original document and the *Taḥqīq* of Ibn al-Jawzī: 2/333, and *Tanqīḥ* of Ibn 'Abd al-Hādī: 3/312. In the *Musnad*, it is mentioned that 'Rhodes' is the well-known Greek island.

⁶⁹ *ḍa'īf*. It was related by Aḥmad 4:181; Abū Dāwūd 4408 p. 1545; al-Tirmidhī 1450 p. 1799; al-Nasā'ī 4982 p. 2408-2409. al-Tirmidhī said: "This is a *gharīb* (strange) *ḥadīth*." Ibn al-Jawzī weakened its *isnād* because of Ibn Lahī'ah.

⁷⁰ *ḍa'īf*. It was related by Sa'īd b. Manṣūr, *al-Sunan*, 2:196. In the *isnād* is Abū Bakr b. 'Abd Allah b. Abī Maryam al-Ghassānī al-Shāmī (d. 156 /772.) who was considered *ḍa'īf* by Aḥmad, Abū Zur'ah al-Razī and many others, while al-Daraqutnī deems him *matrūk*. See Ibn Ḥajar al-'Asqalānī, *Taqrīb al-Tahdhīb*, p. 1116; *Tahdhīb al-Tahdhīb*, 4:490. Al-Dhahabī did not recognise Ḥumayd b. 'Uqbah b. Rūmān b. Zurārah. Humayd was of the *tābi'īn* who met some of the *ṣaḥābah* such as 'Abd Allah b. 'Umar and Abū al-Dardā'. Moreover, there were two other narrators rather than Ibn Abī Maryam who

I [i.e.al-Dhahabī] say: Ibn Abī Maryam is *ḍa'īf*, and who is this Ḥumayd?⁷¹

The other schools argue with the following:

- [91] (Abū Dāwūd): al-Ḥasan b. Yaḥyā al-Khushanī, from Zayd b. Wāqid, from Makḥūl, from 'Ubādah b. al-Ṣāmit, that the Messenger of Allah said: "Carry out the *ḥudūd* at home and abroad, upon near relatives and strangers and do not pay attention in the matter of Allah to those who rebuke."⁷²

The *isnād* of this *ḥadīth* is *wāhi* (very weak). However, their claim is in general terms, and he who makes military raids an exception should be asked for the proof.

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heard from him: al-Walīd b. Sylaymān b. Abī al-Sā'ib and Yaḥyā b. Abī 'Amr al-Sībānī. They both were *thiqah*. See al-Bukhārī, *al-Tārīkh al-kabīr*, 2:349; Ibn Abī Ḥātim al-Rāzī, *al-jarḥ wa al-ta'dīl*, 3:226. Ibn Ḥibbān also mentions him in his book *al-Thiqāt*, 4:149-150, and so does Ibn Ḥajar, *Ta'jīl al-manfa'ah*, 1:106.

⁷¹ He is Ḥumayd b. 'Uqbah b. Rūmān b. Zurārah. He also, heard from Ibn 'Umar. See al-Bukhārī, *al-Tārīkh al-kabīr*, (2/349), Ibn Abī Ḥātim al-Rāzī, *al-jarḥ wa al-ta'dīl*, (3/226), Ibn Ḥibbān mentioned him in his book *al-Thiqāt*, (4/149-150), Ibn Ḥajar, *Ta'jīl al-Manfa'ah*, (1/106).

⁷² *ḍa'īf*. It was related by Abū Dāwūd, *al-Marāsīl*, no. 241 p. 203 from Makḥūl, from 'Ubādah. Makḥūl, however, did not meet 'Ubādah. Therefore Abū Dāwūd considered the *ḥadīth* as a *mursal* (disconnected). Ibn Mājah also, related it 2540 p. 2629 from Rabī'ah b. Nājid (or Nājidh), from 'Ubādah. This is also a weak *isnād* because of Rabī'ah about whom al-Dhahabī said that he is hardly being known (*lā yakād yu'raf*). This is in opposition to Ibn Ḥajar who considered him *thiqah* as both Ibn Ḥibbān and al-'Ijlī did. Whatever the case may be, the *ḥadīth* by mean of joining all chains can be acceptable. See also Aḥmad 5:316, 330; Ibn Ḥajar, *Tahdhīb al-Tahdhīb*, 1:601; *al-Taqrīb*, 323; al-Dhahabī, *al-Kāshif*, 1:394; *Mẓān al-'itidāl*, 2:235; Ibn 'Abd al-Hādī, *al-Tanqīh*, 3:313-314.

6.2 AL-TA'ZĪR (EXEMPLARY PUNISHMENT)

[Issue 40] The amount of *ta'zīr* punishment does not exceed the *ḥadd*.

Mālik said: The Imam carries out *ta'zīr* using his *ijtihād* even if it exceeds the *ḥadd*.

[92] (Bukhārī and Muslim): Yazīd b. Abī Ḥabīb, from Bukayr, from Sulaymān b. Yasār, from 'Abd al-Rahmān b. Jābir, from Abū Burdah, that the Messenger of Allah said: "There is to be no beating above 10 strokes except in a *ḥadd* punishment."⁷³

[93] It is related by our scholars in a *marfū'* form: "He who reaches the amount of the *ḥadd* punishment in a punishment other than a *ḥadd* is a transgressor."⁷⁴

⁷³ *ṣaḥīḥ*. This was related by Aḥmad 3:466 4:45; al-Bukharī in *al-Ḥudūd*, Chapter 'The amount of *ta'zīr* or exemplary punishment.' no. 6875 p. 571; Muslim in *al-Ḥudūd*, Chapter 'The amount of stripes of the *ta'zīr*.' no. 1708 p. 980; Abū Dāwūd 4491 p. 1552; al-Tirmidhī 1463 p. 1801; Ibn Mājah 2601 p. 2633, al-Dāraqutnī 3:207-208.

⁷⁴ *ḍa'if*. It was related by al-Bayhaqī, *al-Sunan al-kubrā*, 8:327 from al-Nu'mān b. Bashīr. al-Bayhaqī said that the *ḥāṭh* is *mursal* (disconnected). See also, al-Zayla'ī, *Naṣb al-rāyah*, 3:354.

6.3 THEFT

[Issue 41] The minimum amount (*niṣāb*) taken into consideration is 1/4 dinar or 3 dirhams or its equivalent

This is also the opinion of Mālik.

Abū Ḥanīfah said: The minimum amount is a dinar or 10 dirhams or its equivalent.

Al-Shāfi'ī said: A quarter of a dinar or its equivalent.

Our evidence:

[94] (Bukhārī and Muslim): Ayyūb, from Nāfi', that Ibn 'Umar said: "The Messenger of Allah cut off the hand for the theft of a shield with a value of three dirhams."⁷⁵

[95] (Bukhārī and Muslim): al-Zuhrī, from 'Amrah, that 'Ā'ishah said: 'The Messenger of Allah used to cut off the hand for the theft of 1/4 dīnār and above.'⁷⁶

⁷⁵ *ṣaḥīḥ*. It was related by Ahmad 2:6, 54, 64, 80, 82, 143, 145; al-Bukhārī in *al-Ḥudūd* no. 6795 p.567; Muslim in *al-Ḥudūd*; Chapter 'The ḥadd for theft and the minimum amount' no. 1686 p. 976; Abū Dāwūd 4385 p. 1543; al-Tirmidhī 1446 p. 1799; al-Nasā'ī 4911 p. 2405; Ibn Mājah 2584 p. 2632; al-Dāraqutnī 3:190.

⁷⁶ *ṣaḥīḥ*. It was related by Aḥmad 6:36, 163, 249 and al-Bukhārī in *al-Ḥudūd*; no. 6790 p.566; and Muslim in *al-Ḥudūd*; Chapter 'The ḥadd for theft and the minimum amount' no. 1684 p. 976; Abū

[96] Aḥmad relates from Hāshim, from Muḥammad b. Rāshid, from Yaḥyā b. Yaḥyā al-Ghassānī, from Abū Bakr b. Hazm, from 'Amrah, from 'Ā'ishah that the Messenger of Allah said: "Cut off the hand for the theft of 1/4 dinar but do not cut off for anything less. 'Ā'ishah said: And its value at that time was [three dirhams.⁷⁷]"⁷⁸

[97] The other schools argued using the *ḥadīth* of Ibn Ishāq, from 'Amr b. Shu'ayb, from his father, that his grandfather said: "The value of a shield at the time of the Messenger of Allah was ten dirhams."⁷⁹

[98] Salm b. Qutaybah, from Zufar b. al-Hudhayl, from Ḥajjāj b. Arṭa'ah, from 'Amr, from his father, from his grandfather in a *marfū'* form: "The hand of a thief is not cut off except for an amount of ten dirhams."⁸⁰

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Dāwūd 4383 p. 1543; al-Tirmidhī 1445 p. 1799; al-Nasā'ī 4923 p. 2406; Ibn Mājah 2585 p. 2632; al-Dāraquṭnī 3:189.

⁷⁷ The phrase in brackets is not clear in the original text. In *al-Musnad* 6:80 'Three Dirhams.' The same goes for Ibn al-Jawzī's *Taḥqīq*: 2/334; and the *Taḥqīq* of Ibn 'Abd al-Hādī: 3/318.

⁷⁸ *ṣaḥīḥ*. It was related by Aḥmad 6:80. This is another link for the *ḥadīth* mentioned above.

⁷⁹ *ḍa'īf*. It was related by Aḥmad 2:180; al-Nasā'ī 4959 p. 2407; al-Dāraquṭnī 3:190. Ibn 'Ishāq is *mudallis*. It also, contradicts the above-mentioned *ḥadīth* authenticated by al-Bukhārī and Muslim. See *ḥadīth* 93.

⁸⁰ *ḍa'īf*. It was related by Ibn Shāhīn 'Umar b. Aḥmad, *al-Nāsikh wa al-mansūkh*, no. 609 p. 455; al-Dāraquṭnī 3:192-193. Ḥajjāj is both weak and *mudallis*. There is another transmission for the *ḥadīth* related from Ibn 'Abbās. See Abū Dāwūd 4387 p. 1543.

[99] (al-Nasā'ī): al-Thawrī, from Maṣṣūr, from Mujāhid, that Ayman said:

“The cutting off of the hand of a thief during the time of the Messenger of Allah did not take place except for the value of a shield. In those days its value was a dinar.”⁸¹

Al-Dāraquṭnī said⁸²: Ayman is one of the *ṭ ā bi'īn*.

The author [i.e. Ibn al-Jawzī] said: Ibn Ishāq, and Salm , and Ḥajjāj are *ḍu'afā'*

[Issue 42] Cutting off the hand is mandatory on he who denies a debt

This is in opposition to the majority.

[100] (Muslim): Al-Zuhrī, from 'Urwah, that 'Ā'ishah said: “A Makhzūmiyyah woman used to borrow items and then deny her debt so the Prophet ordered her hand to be cut off. Her family consequently went to Usāmah and addressed him, so Usāmah spoke to the Messenger of Allah who said: ‘Usāmah, do you seek to address me regarding one of the *ḥudūd* of Allah?’

Then he stood up and spoke, saying: ‘Those before you perished because,

⁸¹ *ḍa'īf*. It was related by al-Nasā'ī in 'Cutting the hand of the thief' Chapter 'The dispute of Abū Bakr b. Muhammad, and 'Abd Allah b. Abū Bakr regarding 'Umrah in this *ḥadīth*.' no. 4946 p. 2407; al-Dāraquṭnī 3:194; al-Ḥākim Muḥammad b. 'Abd Allah, *al-Mustadrak*, 4:379.

⁸² al-Dāraquṭnī in *al-Sunan*, 3:194 said: “Ayman was neither in the life of the Prophet nor the rightly guided Caliphs.” This means that the *ḥadīth* is *mursal* (disconnected).

when one of their noblemen stole they would not touch him, but if one of the weak stole they would cut off his hand. By Allah, if Fāṭimah the daughter of Muḥammad stole, I would cut off her hand.' Then he cut off the hand of the Makhzūmiyyah woman."⁸³

Muslim only transmitted this *ḥadīth*.⁸⁴

⁸³ *ṣaḥīḥ*. It was related by Aḥmad 6:162; Muslim In *al-Ḥudūd*; Chapter 'Cutting the hand of the thief of a high birth.' no.1688 p.976; Abū Dāwūd 4374 p. 1542; al-Nasā'ī 4898- p. 2404.

⁸⁴ This *ḥadīth* has two versions:

- (a) The first one is that mentioned above. "A Makhzūmiyyah woman used to borrow items and then deny her debt so the Prophet ordered her hand to be cut off."
- (b) The second one is also from 'Ā'ishah that "A Makhzūmiyyah woman stole so the Prophet ordered her hand to be cut off." This version is related by al-Bukhārī 6788 p. 566; Muslim 1688 p.976; Abū Dāwūd 4373 p. 1542; al-Nasā'ī 4903 p. 2405; al-Tirmidhī 1430 p. 1797; Ibn Mājah 2547 p. 2629.

The *muḥaddithūn* differed in how to bring these two versions together. The majority i.e. Abū Ḥanīfah, Mālik and al-Shāfi'ī said: a person who borrows something and then denies it, his hand is not cut off. He is like a man who owes a debt to another man and denies it. He does not have his hand cut off for what he has denied. They give preference to the second version over the first one for many reasons, among which are:

- (a) The transmitters of it are more than the first one.
- (b) What is mandatory is to cut off a thief's hand and in this case he is a mere treacherous.
- (c) The Makhzūmiyyah woman was punished for her thievery not for her treachery. The end of the *ḥadīth* supports this i.e. "Those before you perished because when one of their noblemen stole they would not touch him, but if one of the weak stole they would cut off his hand."
- (d) They said that the woman was known for her denying what she use to borrow, therefore 'Ā'isha introduced her by mentioning this attribution. However, the reason behind cutting off her hand was thievery.

The author did not mention the other version from Imam Aḥmad which agrees with the majority view. It is also the preference of great Ḥanbalī jurists such as al-Khiraqī, Abū al-Khaṭṭāb and Ibn Qudāmah who said: "This is the correct view." See Imam Mālik, *al-Muwaṭṭa'*, ed. Bewley p. 353; Al-Ṭaḥāwī, *Sharḥ ma'ānī al-Āthār*, 3:170ff; Ibn Ḥazm, *al-Muḥallā*, 11:358; Ibn Qudāmah *al-Maqdisī*, *al-Mughnī*, 12: 416-417; al-Nawawī, *Sharḥ Ṣaḥīḥ Muslim*, 11:188.

- [101] 'Abd al-Razzāq relates from Ma'mar, from Ayyūb, from Nāfi', that Ibn 'Umar said: "A Makhzūmiyya woman used to borrow items and then deny her debt so the Prophet ordered that her hand be cut off."⁸⁵

[Issue 43] If a group take part in the theft of what amounts to the *niṣāb*, their hands are cut off

This is also the opinion of Mālik with the condition that they take the *niṣāb* together.

Abū Ḥanīfah and al-Shāfi'ī said: The hand is not cut off in such a case.

- [102] (Bukhārī and Muslim): Abū Ṣāliḥ, from Abū Hurayrah, that the Messenger of Allah said: "May Allah's curse be on the thief who steals a single egg and whose hand is therefore cut off; or who steals a rope and whose hand is therefore cut off."⁸⁶

This is not correct except in the manner in which we say, i.e. that each one take an egg or a rope.

⁸⁵ *ṣaḥīḥ*. It was related by Aḥmad 2:151; Abū Dāwūd 4395 p. 1544; al-Nasā'ī 4891 p. 2404. See also *ḥadīth* 99.

⁸⁶ *ṣaḥīḥ*. It was related by Aḥmad 2:253; al-Bukhārī, *al-jāmi' al-ṣaḥīḥ*, 6799 p. 567; Muslim 1687 p. 976; al-Nasā'ī 4877 p. 2403; Ibn Mājah 2583 p. 2632; al-Bayhaqī, *al-Sunan al-kubrā*, 8:253.

[Issue 44] A monetary fine can be combined with cutting off of the hand

Abū Ḥanīfah said: Amputation negates forfeiture.

Mālik said: If the thief is prosperous [the judgment is] as in our [i.e. the Ḥanbalī] *madhhab* [i.e. that a fine and cutting off the hand are combined], and if he is poverty stricken, as in their [i.e. the Ḥanafī] *madhhab*.

Our *ḥadīth* evidence:

- [103] The Prophet's words: "The cost of what the hand has taken is borne by it until it hands it over."⁸⁷**

This has already been mentioned in section on business transactions (*buyū'*).

Their evidence:

- [104] Sa'īd b. 'Ufayr, from Mufaḍḍal b. Faḍālah, from Yūnus b. Yazīd, from Sa'īd b. Ibrāhīm, from his brother Miswar b. 'Abd al-Raḥmān, from 'Abd al-Raḥmān b. 'Awf, that the Messenger of Allah said: "There is no fine upon a thief after cutting off his right hand."⁸⁸**

⁸⁷ *ḍa'īf*. It was related by Aḥmad 5: 8, 13; Abū Dāwūd 3561 p. 1487; al-Tirmidhī 1266 p. 1779; Ibn Mājah 2400 p. 2620; al-Bayhaqī, *al-Sunan al-kubrā*, 8:276. All from al-Ḥasan al-Baṣrī from Samurah. The jurists of *ḥadīth* differ in the connection between al-Ḥasan and Samurah. See Ibn Ḥajar, *al-Talkhīṣ al-ḥabīr*, 2:52; al-Albānī, *'Irwā' al-ghalīl fī takhrīj aḥādīth Manār al-sabīl*, 5:348.

⁸⁸ *ḍa'īf*. It was related by al-Dāraquṭnī 3:182; al-Nasā'ī 4987 p. 2409; al-Bayhaqī, *al-Sunan al-kubrā*, 8:277. al-Bayhaqī considered it as a weak *ḥadīth* due to the disconnection in the *isnād*. See also Ibn Abī Ḥātim, *al-'Ilal*, 1:452; al-Zayla'ī, *Naṣb al-rāyāh*, 3:375.

Al-Dāraqutnī said: Sa'īd is *majh ūl* (unknown), and al-Miswar did not live at the same time as Ibn 'Awf.

[Issue 45] If the thief has the stolen item in his possession in any way the *ḥadd* is not invalidated.

This is in opposition to Abū Ḥanīfah.

[105] Muḥammad b. Abī Ḥafṣah relates from al-Zuhrī, from Ṣafwān Abd Allah b. Ṣafwān, from his father, that Ṣafwān b. Umayyah said: "While I was sleeping a thief came and took my robe from beneath my head. I caught up with him and took him to the Prophet who ordered that his hand be cut off. I said: 'Oh Messenger of Allah, this is not what I intended, he can repay it in charity. He (the Prophet) said: 'You should have done this before you came to me.'"⁸⁹

⁸⁹ *ṣaḥīḥ*. It was related by Aḥmad 3:401; Abū Dāwūd 4394 p. 1543; al-Nasā'ī 4885 p. 2404; Ibn Mājah 2595 p. 2632; al-Dāraqutnī 3:204; al-Ḥākim Muḥammad b. 'Abd Allah, *al-Mustadrak*, 4:380; al-Bayhaqī, *al-Sunan al-kubrā*, 8:265. al-Ḥākim considered it as a *ṣaḥīḥ hadīth* as well did al-Dhahabī. See also Ibn 'Abd al-Barr, *al-Tamhīd*, 11: 216-220.

- [106] Abū Dawūd⁹⁰ related, from the *ḥadīth* of ‘Abd Allah b. ‘Amr b. al-‘Āṣ, that the Messenger of Allah said: “Forgive the *ḥudūd* amongst yourselves, for that which reaches me becomes mandatory.”⁹¹

[Issue 46] The hand of a grave robber is cut off if the value of the shroud reaches the *niṣāb*.

This is in opposition to Abū Ḥanīfah

- [107] Our scholars relate that the Prophet cut off the hand of a grave robber.⁹²
- [108] Isrā’īl relates from ‘Abd Allah b. al-Mukhtār, that Mu‘āwīyah b. Qurrah said: His hand is cut off.⁹³
- [109] Yūnus relates from al-Ḥasan and Muḥammad, who both said that the hand of a grave robber is cut off.⁹⁴

⁹⁰ In *al-Ḥudūd*, Chapter 'The *Ḥudūd* are forgiven for that which reaches the authority' p.1542; no.4376.

⁹¹ *ṣaḥīḥ*. It was related by Abū Dāwūd, In *al-Ḥudūd*, Chapter 'The *Ḥudūd* is forgiven for that which reaches the authority' no.4376 p.1542; al-Nasā’ī 4889 p. 2404; al-Dāraquṭnī 3:113; al-Ḥākim Muḥammad b. ‘Abd Allah, *al-Mustadrak*, 4:383; al-Bayhaqī, *al-Sunan al-kubrā*, 8:331. Both al-Ḥākim and al-Dhahabī authenticated it.

⁹² The *ḥadīth* does not exist in any available *ḥadīth* compilation. This indicates that it is not true (*lā aṣl lahu*). On the other hand, Ibn Abī Shaybah relates from ‘Īsā b. Yūnus, from Ma‘mar, that al-Zuhri said: “A band of body snatchers were brought to Marwān b. al-Ḥakam, so he beat them and banished them. This happened in the presense of the Companions.” This is a sound relation. See Ibn Abī Shaybah, *al-Muṣannaf*, 5:518; al-Bayhaqī, *al-Sunan al-kubrā*, 8:269.

⁹³ It is related by Ibn Abī Shaybah, *al-Muṣannaf*, 6:530-531.

[Issue 47] If a person steals for the third time his hand is not cut off but, according to the more correct of the two versions, he is imprisoned.

This is also the opinion of Abū Ḥanīfah.

In the other version [from Aḥmad]: In the third instance his left hand is cut off, and in the fourth his right foot. This is the opinion of Mālik and al-Shāfi'ī.

[110] Isma'īl al-Shālinjī relates from Muḥammad b. al-Ḥusayn, from Abū Ḥanīfah, from 'Amr b. Murrah, from 'Abd Allah b. Salamah, that 'Alī said: "If a thief steals, his right hand is cut off. If he steals again, his left foot is cut off. If he steals again, he is imprisoned until he comes up with some good. I would be ashamed to leave him to live without hand or foot."⁹⁵

The other schools argue using the *ḥadīth*:

[111] Yazīd b. Sinān al-Rahāwī relates from Hishām b. 'Urwah, from Ibn al-Munkadir, that Jābir said: "The Messenger of Allah was brought a thief so

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⁹⁴ See al-Baghawī, *Sharḥ al-sunnah*, 10:323.

⁹⁵ *ṣaḥīḥ*. It was related by al-Dāraquṭnī 3:103, 180. Shu'bah b. al-Ḥajjāj followed Abū Ḥanīfah in his transmission from 'Amr b. Murrah. It is in *al-Muṣannaḥ* of Ibn Abī Shaybah Abū Bakr 'Abd Allah b. Muḥammad, 5:487 and al-Bayhaqī, *al-Sunan al-kubrā*, 8:275. See al-Zayla'ī, *Naṣb al-rāy*, 3:374.

he cut off his hand. He stole again so he cut off his leg. He stole again so he cut off his other hand. He stole again so he cut off his other leg. He stole again so he ordered that he be killed.”⁹⁶

Muḥammad b. Yazīd b. Sinān is the sole transmitter of this *ḥadīth*, from his father, and he is *ḍa‘īf*.

- [112] Al-Dāraqutnī relates from Muḥammad b. al-Ḥasan al-Muqri', from Aḥmad b. al-‘Abbās, from Isma‘īl b. Sa‘īd, from al-Wāqidī, from Ibn Abī Dhi'b, from Khālīd b. Salamah, from Abū Salamah, that Abū Hurayrah in a *marfū‘* form said: “If a thief steals it, then cut off his hand. If he repeats it, then cut off his foot. If he repeats it, then cut off his hand. If he repeats it, then cut off his foot.”⁹⁷

Al-Wāqidī is *ḥālik*.

⁹⁶ *ḍa‘īf*. It was related by al-Dāraqutnī 3:180-181; al-Bayhaqī, *al-Sunan al-kubrā*, 8:272. There is another version from Jābir that a thief was brought to the Prophet who said: “kill him!” The Companions said: ‘He merely stole.’ So the Prophet said: ‘Then cut off his hand. So they did it. The thief repeated his crime 4 times. The reactions of the Prophet and his Companions in each time were the same. On the fifth time the Prophet said: kill him, so they kill him and threw him in a well, followed by rubble.’ This was related by Abū Dāwūd 4410 p. 1545 and al-Nasā‘ī 4981 p. 2408. al-Nasā‘ī said that this is a *munkar ḥadīth* [i.e. weak]. al-Shāfi‘ī said: the *ḥadīth*, with no discord amongst the people of knowledge, is abrogated. Ibn ‘Abd al-Barr said: It is *munkar, lā aṣl lahu* (weak and has no foundation). Ibn Ḥajar reported this in his, *al-Talkhīṣ al-ḥabīr*, 4: 69.

⁹⁷ *ḍa‘īf jiddan* (very weak.) It was related by al-Dāraqutnī 3:181. In the *isnād* there is al-Wāqidī who is a very weak narrator. ‘Abd al-Razzāq al-Ṣan‘ānī, *al-Muṣannaḥ*, 10:187-188 related the same text but from Qatādah in a *maqṭū‘* form.

- [113] Khālīd al-Ḥadhdhā', from 'Ikrimah, from Ibn 'Abbās: "I witnessed 'Umar cutting off a person's other hand after he had already one hand and one foot cut off."⁹⁸

[Issue 48] The *ḥadd* for adultery is averted by repentance (*tawbah*), and this is also the case for theft and the drinking of alcohol.

Also from Aḥmad: It is not averted, as is the opinion of Abū Ḥanīfah and Mālik, and the same as those two *madhabs* has also been related from al-Shāfi'ī.

- [114] Salm b. Sālim relates from Sa'īd al-Ḥimṣī, from 'Āsim al-Jidhāmī, from 'Aṭā', from Ibn 'Abbās that the Messenger of Allah said: "One who repents from a sin is like one who has no sin."⁹⁹

I [i.e. al-Dhahabī] say the *isnād* of this *ḥadīth* is *muḏim*.

⁹⁸ *ṣaḥīḥ*. It was related by al-Dāraquṭnī 3:181; Ibn Abī Shaybah Abū Bakr 'Abd Allah b. Muḥammad, *al-Muṣannaf*, 5:486. 'Abd al-Razzāq al-Ṣan'ānī, *al-Muṣannaf*, 10:187.

⁹⁹ *ḍa'īf*. This is a part of a *ḥadīth* related by al-Bayhaqī, *Shu'ab al-īmān*, 5: 436 no. 7178. In the *isnād* there is Salm b. Sālim al-Balkhī, a weak narrator, and Sa'īd al-Ḥimṣī is unknown. There is another version related by Ibn Mājah 4250 p. 2735 from Abū 'Ubaydah from Ibn Mas'ūd. All the transmitters in this version are *thiqah* but it is disconnected as Abū 'Ubaydah did not hear the *ḥadīth* from Ibn Mas'ūd. The meaning of the *ḥadīth*, however, is agreeable and conformable to the Qur'ān and *Sunnah*. See for more details: al-Albānī, *Silsilat al-aḥādīth al-ḍa'īfah*, no. 615, 616.

[Issue 49] **A woman apostate is killed.**

This is in opposition to Abū Ḥanīfah.

[115] **This is because of the saying of the Prophet: “If someone changes his religion, kill him.”¹⁰⁰**

[116] **Ma‘mar b. Bakkār al-Sa‘dī, relates from Ibrāhīm b. Sa‘d, from al-Zuhrī, from Muḥammad b. al-Munkadir, from Jābir: “A woman called Umm Rūmān became an apostate from Islam, so the Prophet ordered that Islam be explained to her and if she did not return to it then she would be killed.”¹⁰¹**

I [i.e. al-Dhahabī] say: Ma‘mar was considered to be *layyin* by al-‘Uqaylī.

[117] **‘Abd Allah b. ‘Udhaynah relates from Hishām b. al-Ghār, from Ibn al-Munkadir, from Jābir, the same *ḥadīth* to which is added: “But she refused to accept Islam so she was killed.”¹⁰²**

¹⁰⁰ *ṣaḥīḥ*. See *ḥadīth* 50.

¹⁰¹ *ḍa‘īf*. It was related by al-Dāraquṭnī 3:118-119; al-Bayhaqī, *al-Sunan al-kubrā*, 8:203, and as well as Ibn Ḥajar in his *al-Talkhīṣ al-ḥabīr*, 4:49 consider the *isnād* weak. See also, al-Zayla‘ī, *Naṣb al-rāyah*, 3:458. Ibn Ḥajar pointed out to an error in the original text regarding the apostat’s name. It is mentioned as ‘Umm Rūmān while the correct is ‘Umm Marwān.

¹⁰² *ḍa‘īf Jiddan* (very weak.) It was related by al-Dāraquṭnī 3:119; Ibn ‘Adī, *al-Kāmil*, 4: 1530; al-Bayhaqī, *al-Sunan al-kubrā*, 8:203. See also the previous *ḥadīth* 113. In the *isnād* there is ‘Abd Allah b. ‘Udhaynah who is labelled *munkar al-ḥadīth* (very weak.)

- [118] Muḥammad b. ‘Abd al-Malik al-Anṣārī relates from al-Zuhrī, from ‘Urwah, from ‘Ā’ishah who said: “A woman apostasised on the day of the battle of ‘Uḥud so the Prophet ordered that she be asked to repent.”¹⁰³ These *ḥadīths* were transmitted by al-Dāraqutnī.
- I [i.e. al-Dhahabī] say that this is not *ṣaḥīḥ*.

- [119] ‘Abd Allah b. ‘Īsā al-Khazarī relates from ‘Affān from Shu‘bah, from ‘Āṣim, from Abū Razīn, from Ibn ‘Abbās that the Messenger of Allah said: “The woman apostate is not to be killed.”¹⁰⁴
- Al-Dāraqutnī said that al-Khazarī is a liar.

6.4 AL-ṢAWL

- [Issue 50] What animals spoil during daylight hours is not the responsibility of their owner if he is not with them. What they spoil during the night, however, is the responsibility of the owner.

¹⁰³ *ḍa‘īf Jiddan* (very weak.) It was related by al-Dāraqutnī 3:118; al-Bayhaqī, *al-Sunan al-kubrā*, 8:203; al-Zayla‘ī in his *Naṣb al-rāyāh*, 3:458 pointed out to the defect in the *isnād* which is Muḥammad b. ‘Abd al-Malik. He was described as a *ḥadīth* fabricator.

¹⁰⁴ *mawḍū‘* (fabricated.) It was related by al-Dāraqutnī 3:117-118. In the *isnād* there is ‘Abd Allah b. ‘Īsā al-Jazarī. Al-Dāraqutnī said: “He is a liar who use to fabricate *ḥadīth*. This *ḥadīth* can never be established from the Prophet.” It was related also, as a *fatwā* from Ibn ‘Abbās. See ‘Abd al-Razzāq al-Ṣan‘ānī, *al-Muṣannaf*, 10:177; Ibn Abī Shaybah Abū Bakr ‘Abd Allah b. Muḥammad, *al-Muṣannaf*, 5:557; al-Bayhaqī, *al-Sunan al-kubrā*, 3:203.

Abū Ḥanīfah says that there is no responsibility except when a drover or rider is with the beasts or someone has sent them.

- [120] Aḥmad relates from Muḥammad b. Muṣ'ab, from al-Awzā'ī, from al-Zuhrī, from Ḥarām b. Muḥayyisāh, that al-Barā' had a wild camel which entered an orchard and caused ruin therein. The Messenger of Allah (s.a.s) decreed that the security of orchards during the day was the responsibility of their owners, and that the tending of beasts during the night was the responsibility of their owners.¹⁰⁵

[Issue 51] What a beast destroys with its foot while its owner is riding it is not his responsibility

Mālik said it is not his responsibility, whether the animal ruins something with its foot or hand, if the person who is with it does not cause it.

Al-Shāfi'ī said the owner is responsible for what the animal does with its hand or foot.

¹⁰⁵ *ṣaḥīḥ*. It was related by Aḥmad 4:295; Abū Dāwūd 3569 p. 1488; Ibn Mājah 2332 p. 2616; Mālik, *al-Muwaṭṭa'*, trd. Bewley no. 1467 p. 308; al-Dāraqutnī 3:155.

- [121] (al-Bukhārī): Hammām, from Abū Hurayrah that the Messenger of Allah said: "An *`ajmā'* is *jubār* and a well is *jubār*."¹⁰⁶

`ajmā' means: a beast and *jubār* means: no compensation for it.

The meaning of the *ḥadīth* is that there is no compensation for one killed or wounded by an animal or by falling in a well or because of working in mines.

- [122] Sufyān b. Ḥusayn relates from al-Zuhrī, from Ibn al-Musayyib, from Abū Hurayrah that the Messenger of Allah said: "The foot of an animal is *jubār*."¹⁰⁷

Al-Dāraquṭnī said¹⁰⁸ that he [i.e. Ḥusayn b. Sufyān] is the only narrator who mentioned this addition [i.e. the foot of an animal is *jubār*] which is an error. The *ḥadīth* is related by Abū Ṣāliḥ, and al-A'raj, and Ibn Sīrīn, and Muḥammad b. Ziyād, and others, and they did not mention the addition. Ādam is the sole relater who relates from Shu'ba, from Muḥammad b. Ziyād, from Abū Hurayrah that the Messenger of Allah said: "The foot of an animal is *jubār*."

¹⁰⁶ *ṣaḥīḥ*. It was related by Aḥmad 2:318-319; al-Bukhārī in *al-Zakāt*, Chapter 'On precious minerals subject to the Khums tax.' no.1499 p.118; Muslim 1710 p. 981; Abū Dāwūd 4593 p. 1560; al-Tirmidhī 1377 p. 1791; al-Nasā'ī 2497 p. 2249; al-Dāraquṭnī 3:149, 151.

¹⁰⁷ *ṣaḥīḥ*. It was related by al-Dāraquṭnī 3:152, Muslim 1710 p. 981; Abū Dāwūd 4592 p. 1560; al-Tirmidhī 1377 p. 1791; Ibn Mājah 2673 p. 2637.

¹⁰⁸ See al-Dāraquṭnī, *al-Sunan*, (3/152).

[Issue 52] If someone bites the hand of a man and the other pulls his hand from his mouth and his teeth come out, there is no recourse available to him

Mālik said that there is recourse.

Our *ḥadīth* evidence:

[123] (al-Bukhārī and Muslim): Shu‘bah, from Qatādah, from Zurārah, that ‘Imrān b. al-Ḥuṣayn said: “Ya‘lā b. Umayyah fought a man and one of them bit the hand of the other and he pulled his hand from his mouth and extracted some teeth. They went to the Prophet to settle the dispute. He said: "Do you bite your brother's hand as a horse bites? There is no recompense for this.”¹⁰⁹

[124] (Bukhārī and Muslim): Ibn Jurayj from ‘Aṭā', from Ṣafwān b. Ya‘lā b. Umayyah, that his father said: “A workman of mine fought with a man and bit his hand. He tore his hand from his mouth and knocked out some teeth.

¹⁰⁹ *ṣaḥīḥ*. It was related by Aḥmad 4:427, 428, 435; al-Bukhārī in *al-Diyāt*; Chapter 'If a man bites another and his tooth is knocked out.' no.6892. p.574; Muslim in *al-Qasāmah*; Chapter 'One who harms himself' no. 1673 p.973; al-Tirmidhī 1416 p. 1795; al-Nasā'ī 4764 p. 2396; Ibn Mājah 2657 p. 2637.

He went to the Prophet who nullified the claim saying: "Does he put his hand in your mouth for you to gnaw like a horse?"¹¹⁰

[Issue 53] If a person spies on the people of another household, they have the right to shoot at his eye, and if they put it out there is no recompense due.

Abū Ḥanīfah said there is recompense.

[125] (Bukhārī and Muslim): Al-Zuhrī relates that Sahl b. Sa'd said: "A man spied upon the chamber of the Prophet while he was combing his head with a sharp comb. He said: If I knew that you were looking I would poke your eye out with it, because seeking permission has only been decreed because of looking."¹¹¹

[126] (al-Bukhārī and Muslim): Ḥammād b. Zayd, from 'Ubayd Allah b. Abū Bakr that Anas said: "A man spied on the Prophet from one of his rooms, so

¹¹⁰ *ṣaḥīḥ*. It was related by Aḥmad 4:222, 224; al-Bukhārī in *al-Jihād*, Chapter 'The hired labourer' no.2973, 2265 p.239, 175; Muslim in *al-Qasāmah*, Chapter 'The person who harms himself' no.1674 p.973; Abū Dāwūd 4584 p. 1560; al-Nasā'ī 4771 p. 2396; Ibn Mājah 2656 p. 2636-3637.

¹¹¹ *ṣaḥīḥ*. It was related by Aḥmad 5:330, 334-335; al-Bukhārī in *al-Diyāt*, Chapter 'The person who spies into the house of others.' no. 6901 p.576; Muslim in *al-Adab*, Chapter 'Forbidding looking into the house of others.' no.2156 p.1062; al-Tirmidhī 2709 p. 1925; al-Nasā'ī 4863 p. 2402.

the Prophet rose with an arrowhead in his hand and it seemed he was trying to dupe the man so that he could stab him.”¹¹²

- [127] (al-Bukhārī and Muslim): Abū al-Zinād, from al-A'raj, from Abū Hurayrah that Abū al-Qāsim [i.e. the Prophet] said: “If ever a person looks upon you without your permission and you throw a pebble at him and put out his eye, you will not be at fault.”¹¹³

- [128] (Muslim): Suhayl from his father, from Abū Hurayrah in a *marfū'* form: “If someone spies upon people in their house without their permission, it is permissible for them to put out his eyes.”¹¹⁴

- [129] Qatādah relates from al-Naḍr b. Anas, from Bashīr b. Nahīk, from Abū Hurayrah, that the Messenger of Allah said: “if someone spies upon people

¹¹² *ṣaḥīḥ*. It was related by Al-Bukhārī in *al-Diyāt*; Chapter 'A person who spies on the house of others.' no.6900 p.576; Muslim in *al-Adab*, Chapter 'Forbidding looking into the house of others.' 2157 p.1062; Abū Dāwūd 5171 p. 1601; al-Tirmidhī 2708 p. 1925; Aḥmad 3:108, 140, 178, 191, 239, 242.

¹¹³ *ṣaḥīḥ*. It was related by Al-Bukhārī in *al-Diyāt*; Chapter 'A person who spies on the house of others.' no.6902 p.576; Muslim in *al-Adab*; Chapter 'Forbidding looking into the house of others.' no.2158 p.1062; Abū Dāwūd 5172 p. 0601; al-Nasā'ī 4865 p. 2402; Aḥmad 2:243, 227, 266, 414.

¹¹⁴ *ṣaḥīḥ*. It was related by Aḥmad 2:414, 527; Muslim in *al-Adab*; Chapter 'Forbidding looking into the house of others.' no.2158 p.1062; Abū Dāwūd 5172 p. 1601.

in their house without their permission and they put out his eyes, there is no recompense due nor full blood money.”¹¹⁵

This was related by Aḥmad.

[Issue 54] Circumcision is mandatory for men. As for women there are two versions.

Abū Ḥanīfah and Mālik said it is not mandatory.

[130] (al-Bukhārī and Muslim): Abu al-Zinād from al-A'raj, from Abū Hurayrah that the Messenger of Allah said: “Abraham, the friend of the Merciful (*Khalīl al-Raḥmān*), was circumcised after having lived eighty years.”¹¹⁶

[131] Ibn Jurayj said: I have been told from Ghunaym b. Kulayb, from his father, from his grandfather: “That he came to the Prophet and said: “I have accepted Islam.” He said: “Cut off the hair of disbelief.” (The narrator continues) Another person who was with his grandfather told me that the

¹¹⁵ *ṣaḥīḥ*. It was related by Aḥmad 2:266, 414, 527; al-Dāraqūṭnī 3:199, al-Nasā'ī 4864 p. 2402.

¹¹⁶ *ṣaḥīḥ*. It was related by Aḥmad 2:322; al-Bukhārī no.3356 p. 272; Muslim no.2370 p.1094.

Prophet said to another man: "Cut off the hair of disbelief and get circumcised."¹¹⁷

I [i.e. al-Dhahabī] say this is *munqaṭi'*.

- [132] (al-Nasā'ī): 'Abd al-Raḥmān b. 'Ishāq, from al-Maqburī, from Abū Hurayrah that the Messenger of Allah said: "Five things are parts of the *fiṭrah* . . .", and he mentioned circumcision amongst them."¹¹⁸

- [133] Ḥajjāj b. Arṭa'ah relates from Abū al-Malīḥ b. Usāmah, from his father that the Messenger of Allah said: "Circumcision is a *sunnah* for men, and a noble trait in women."¹¹⁹

Ḥajjāj is *ḍa'īf*.

¹¹⁷ *ḍa'īf*. It was related by Aḥmad 3:415; Abū Dāwūd 356 p. 1250; 'Abd al-Razzāq al-Ṣan'ānī, *al-Muṣannaḥ*, 6:10; al-Bayhaqī, *al-Sunan al-kubrā*, 1: 172.

¹¹⁸ *ṣaḥīḥ*. It was related by al-Nasā'ī no. 9, 10 p. 2087 and no. 5046 p. 2413; al-Bukhārī, *al-jāmi' al-ṣaḥīḥ*, no. 5891 p. 501 and no. 6297 p. 530; Muslim 257 p. 723; Abū Dāwūd 4198 p. 1528; al-Tirmidhī 2756 p. 1929; Ibn Mājah 292 p. 2495; Mālik 2:921; Aḥmad 2:229, 239, 283, 410 from al-Zuhrī, from Ibn Al-Musayyib, from Abū Hurayrah.

¹¹⁹ *ḍa'īf*. It was related by Aḥmad 5:75; al-Bayhaqī, *al-Sunan al-kubrā*, 8:325. al-Ṭabarānī in his *al-Mu'jam al-Kabīr*, 7:273 related it from Ḥajjāj, from Abū al-Malīḥ b. Usāmah, from his father, from Shaddād b. Aws. Both Ibn Abī Ḥātim in his *al'Ilal*, 2:247 and Ibn 'Abd al-Barr in his *al-Tamhīd*, 21:59 mention the *ḥadīth* and consider the *isnad* weak it due to Ḥajjāj b. 'Arṭa'ah.

CHAPTER 7: MILITARY CAMPAIGNS (*AL-SIYAR*)

Most scholars say that going out to battle against the *kuffār* (non-believers) is mandatory until they enter Islam or pay the *Jizyah*.¹ Fighting them in this way is *farḍ kifāyāh* (mandatory to the extent of sufficiency) in that if some Muslims undertake it, it will no longer be incumbent upon the rest of them. Ibn Jarīr al-Ṭabarī said: "The generality of Muslim scholars are of this opinion which is also correct in our view."² From this it becomes clear that the claim of certain contemporaries³ that fighting is not legal in Islam except in the way of defence and to stave off attacks, is an innovation which has no basis in Islamic law and has no genuine evidence to support it. In addition, it is in opposition to the consensus of earlier Muslim scholars.

¹ See: Ibn al-Mundhir Abū Bakr Muḥammad b. Ibrāhīm (d.318/930), *al-Iqnā'*, 2:448; al-Ṭahāwī Muḥammad b. Aḥmad (d.321/933), *Ikhtilāf al-'ulamā'* summarised by Abū Bakr al-Jaṣṣāṣ, (d.370/980) 3:426; Ibn 'Abd al-Barr, *al-Kāfī*, 1:466; al-Qāḍī 'Abd al-Wahhāb al-Malikī (d.422/1030), *'Uyūn al-majālis*, 2:681 ff.; Ibn Ḥazm, *al-Muḥallā* 7:291. Ibn Hubayrah Yaḥyā b. Aḥmad (d.560/1164) *al-Iḥṣāh*, 2:273; Ibn Ḥajar, *Fatḥ al-Bārī*, 6:38; al-Sharbīnī Muḥammad al-Khaṭīb, *Mughnī al-Muḥtāj ilā Ma'ānī Alfāz al-Minhāj*, 4:261; *al-Mawsū'ah al-fiqhiyyah*, 16:129.

² Ibn Jarīr al-Ṭabarī, *Jamī' al-bayān*, ed. Aḥmad Shākir, 4:296. He mentioned two other views:

- (i) It was mandatory only upon the Companions.
- (ii) It is mandatory upon every Muslim until the end of this life.

The first view is of 'Aṭā' related in a weak *isnād* because of Ḥajjāj b. Arṭa'ah. The second one is of Ibn 'Abbās. It is related also in a very weak *isnād* because of Ḥusayn b. Qays al-Raḥabī who is very weak transmitter.

³ See: Muḥammad 'Abdu, *Risālah al-tawḥīd*, p. 180; Muḥammad Rashīd Riḍa, *al-Waḥy al-Muḥammadī*, p. 271-272 and *Tafsīr al-Manār*, 2:207, 9:665, 10:307; Sayyid Sābiq, *fiqh al-sunnah*, 2:613; Muḥammad 'Abd Allah Draz, *Madkhal ilā al-Qur'ān al-karīm*, p.60-67; Wahbah al-Zuhaylī, *Āthār al-ḥarb fī al-fiqh al-Islāmī*, p.130, 138.

Those who have adopted this opinion have done so because of the accusations raised about Islam by its enemies who wish to take the people away from the religion of Allah as in the Qur'ānic verse: "You who have *'im ān*! Many of the rabbis and monks devour people's property under false pretences and bar people from access to the Way of Allah."⁴ Among these accusations is that Islam was spread by the sword and that it is a religion of brutality and killing which has no notion of world peace etc. When these reformers and thinkers wanted to reply to these accusations and to invite people to Islam they began to change various principles and truths in the Islamic *sharī'ah* including things that were the subject of consensus amongst the Islamic community and about which there was no dispute. They did this with the good intention and fine aim of inviting to Islam and advocating it. However, Allah does not accept an action until two conditions have been fulfilled: the action must be solely for Him and the action must be correct.⁵ What is meant by correct is that which is in accord with the Qur'ān and *sunnah*.

N.B. It is not required of a Muslim to convince the people about Islam nor to get them to enter into it but the Muslim is ordered to deliver the message of the religion of Allah and to offer it to the people as Allah has wished. Allah has said to His Prophet: "If they argue with you, say, 'I have submitted myself completely to Allah,

⁴ *Al-Tawbah*, 9:34.

and so have all who follow me.' Say to those who have given the Book and those who have no Book, 'Have you become Muslim?' If they become Muslim, they have been guided. If they turn away, you are only responsible for transmission. Allah sees His slaves."⁶ and He has said: "But most people, for all your eagerness, are not *mu'minūn*."⁷, and He has said: "Even if We sent down Angels to them, and the dead spoke to them, and We gathered together everything in front of them, right before their eyes, they would still not have *'īmān* unless Allah willed. The truth is that most of them are ignorant."⁸ All these are realities which can be witnessed. There are many non-Muslims who know more than many Muslims about Islam but they do not believe in it either out of obstinacy or pride or envy or for other reasons. The ignorance of this reality by some Muslims makes them fall into these traps. As for the answer to these charges, we will deal with them in the following discussion:

The Aims of *Jihād* in Islam

The aims of fighting in the way of Allah are clear in the Holy Qur'ān and the authentic *sunnah*. These aims are:

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⁵ See Ibn Kathīr, *al-Tafsīr*, 3:147.

⁶ 'Āl 'Imrān, 3:20.

⁷ Yūsuf: 12:103.

1. A call to Monotheism and the destruction of Polytheism so that religion is only for Allah. Allah has said: "Fight them until there is no more *fitnah*⁹ and the *dīn* is Allah's alone."¹⁰ The Prophet said: "I have been ordered to fight the people until they say that there is no deity but Allah and that I am the messenger of Allah. If they say this then their blood and wealth will be protected from me except what is due, and their account will be upon Allah."¹¹ Hence, whoever does not reject the call of Allah and does not kill the people of Allah will not be killed or fought, in the same way as women, children, old men, priests, blind people and sick people will not be killed unless they fight. This is because Allah has made the killing of persons allowable only to the amount needed for the well being of Creation.¹² Allah has said: "If it were not for Allah's driving some people back by means of others, the earth would have been corrupted. But Allah shows favour to all the worlds."¹³ Whoever is content to live under the law of Allah and fulfils the monetary obligation to the

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⁸ *Al-An'ām*, 6:112.

⁹ Ibn 'Abbās, Mujāhid b. Jabr, Qatādah and many other jurists explained *fitnah* in this verse as *shirk* (polytheism.) See Ibn Jarīr al-Ṭabarī, *Jāmi' al-bayān*, 3:570.

¹⁰ *Al-Anfāl*, 8:39.

¹¹ *ṣaḥīḥ*. It was related by al-Bukhārī, *al-jāmi' al-ṣaḥīḥ*, 25 p. 4; Muslim 22 p. 685 from 'Abd Allah b. 'Umar.

¹² See: Ibn Taymiyyah, *Majmū' al-Fatāwā*, 28:354 – 355.

¹³ *Al-Baqarh*, 2: 249.

Islamic state is allowed to continue in his own religion on the conditions that will be mentioned subsequently. This monetary obligation is a great deal less than those heavy obligations which citizens are under in many states in the form of taxes.

2. So that the word of Allah is the highest and so that the religion of Allah and His divine law prevail over the other religions' laws. Allah said: "It is He who sent His Messenger with guidance and the *Dīn* of Truth to exalt it over every other *dīn* even though the *mushrikūn* detest it."¹⁴ This is the reality which escapes the people and their conceptions, meaning the reality of defining what is the truth. Is the truth what the constitutional parliaments in every country believe it to be, or is it what the majority of the people believe it to be, or is it what Allah wants from them through His Messengers and His revealed Books?

3. The punishment of those who fail to observe that which Allah has made incumbent upon them or has prohibited them from doing. Allah has said: "Fight those of the people who were given the Book who do not have '*īmān*' in Allah and the Last Day and do not make *ḥarām* what Allah and His Messenger have made *ḥarām* and do not take as their *dīn* the *dīn* of Truth, until they pay the *Jizyah* with

¹⁴ *Al-Tawbah*, 9: 33. See also, Ibn Taymiyyah, *Majmū' al-Fatāwā*, 28:69; and *al-Mawsū'ah al-fiqhiyyah*, 16:132; and The Tafsir of Ibn Jarīr, and al-Qurṭubī, and Ibn Kathīr of the verse of Sura Barā'ah, 9:33.

their own hands in a state of abasement.”¹⁵ Amongst the attributes of those it is mandatory to fight are those who do not hold as prohibited that which Allah and His messenger have prohibited. This applies to any group who refuses to observe any clear and well known legal ruling of Islam. Abū Bakr al-Ṣiddīq, the first guided Caliph, fought those who refused to pay the *zakāt* and all the Companions and the Muslims were in consensus over this issue.¹⁶

4. The liberation of humanity from slavery to other than Allah, whether that be slavery to another person or to a vain notion or to a system. Islam is a call to take people away from worshipping people to worshipping Allah alone, and from the tyranny of other ways of life to the justice of Islam, and from the narrowness of this world to the expanse of this world and the next.¹⁷

5. The protection of the government, the people, the resources and the wealth of the Muslim state from attack. The Islamic *ummah* is not merely land and borders but is a group of individuals, communities, systems, values, and morals all of which needs

¹⁵ *Al-Tawbah*, 9:29.

¹⁶ See: *Majmū' al-Fatāwā* of Ibn Taymīyyah: 28/308,349.

¹⁷ See the speech of Rib'ī b. 'Āmir, the Companion, addressed to Rustum, the commander of the Persian army on the day of al-Qādisiyyāh. Ibn Kathīr, *al-Bidāyah wa al-nihāyah*, 9:621-622.

force to protect them and defend them and this force is found in the system of *jihād* in Islam.

These are the aims of *jihād* in Islam. We may sum up by saying that the aim of *jihād* is to establish peace and security in the world by establishing Allah's Law, which is Islam.

Among the important topics of discussion regarding *jihād* is the delineation of what is known as *dār al-Islam* and *dār al-ḥarb* because of what follows on from this delineation in the way of laws of *jihād*, and of social interaction, and mandatory punishments which will be discussed below.

◆ *Dār al-Islam and Dār al-Kufr*

Scholars have differed over the definition of *dār al-Islam* and *dār al-kufr* as follows:

- (i) The first opinion is that every place in which the Islamic Law prevails is known as *dār al-Islam*, and every place in which the laws of the non-believers prevail is known as *dār al-kufr*. There is no in between. They explain this by saying that attributing a land to Islam or to *kufr* is through appearance and prevalence of each one of them and that Islam appears in a land by the appearance of its laws. The

same goes for *kufr*. Ibn Ḥazm al-Zāhirī said: “The land is only attributed to whoever rules over or governs it.”¹⁸ Amongst those who hold this opinion are the Ḥanbalites¹⁹, and Qāḍī Abū Yūsuf, and Muḥammad b. al-Ḥasan al-Shaybānī among the Ḥanafīs.²⁰

The phrase ‘The appearance of Islam’ or ‘The institution of the laws of Islam in a land’ has been interpreted as:

- (a.) Instituting the Friday prayers and ‘*īd*’ prayers.²¹
- (b.) Expressing openly. Loyalty to Islam and enmity and detestation to the non-believers.²²

(ii) The second opinion is that *dār al-kufr* becomes *dār al-Islam* by the appearance of the laws of Islam in it and that *dār al-Islam* becomes *dār al-kufr* on three conditions:

- (a.) The appearance of the laws of *kufr* therein.

¹⁸ See Ibn Ḥazm, *al-Muḥallā*, 11:200.

¹⁹ See: Ibn Mufliḥ ‘Abd Allah b. Muḥammad al-Maqdisī (d.763), *al-Ādāb al-Shar‘īyyah*, 1:211, ed. Shu‘ayb al-Arna’ūt, Beirut: Mu’assasah al-Risālah, 1996.

²⁰ See: al-Kāsānī Mas‘ūd b. Aḥmad, *Badā‘i’ al-ṣanā‘i’ fī tartīb al-sharā‘i’*, vol.6, section on military raids, chapter on the meaning of ‘*dār al-Islam* and *dār al-kufr*’.

²¹ See: *Durar al-ḥukkām sharḥ ghurar al-aḥkām*, section on *jihād*.

²² ‘Ishāq b. ‘Abd al-Raḥmān b. Ḥasan, *al-Durar al-saniyyah*, 8:305.

- (b.) That it be adjacent to *dār al-kufr*.
- (c.) That there no longer remain therein a Muslim, or a dhimmī who believes he has the sanctuary of the Muslims.

This is the opinion of Abū Ḥanīfah.²³ It is of note that this opinion is in concord with the first opinion in that it has the appearance of the laws of Islam in a land as a condition of its status as *dār al-Islam*. However he (Abū Ḥanīfah) is reserved in withdrawing the term *dār al-Islam* by setting some conditions. His opinion may be explained that the laws are based upon sanctuary and fear not upon Islam and *kufr*, and that the laws of *kufr* do not appear except in the last two conditions.²⁴ On contemplation, we would say that the first condition is obvious. As for the condition of being adjacent to a land of the non-believers or not being so, there is no basis for this in law and there is no evidence for it and historical fact proves the opposite to be the case. As for the condition of sanctuary, it is explained that what is established remains as long as some of its traces remain and will not be lifted unless something like it or stronger than it opposes it.

²³ See: al-Kasānī, *Badā'i al-ṣanā'īfī tartīb al-sharā'ī'*, vol.6, section on Military raids, chapter on the meaning of '*dār al-Islam* and *dār al-kufr*.'

²⁴ See Muḥammad b. al-Ḥasan al-Shaybānī, *Sharḥ al-siyar al-kabīr*, chapter: cutting wood in *dār al-ḥarb*.

(iii) The third opinion is that *dār al-Islam* is every land in which a Muslim is able to practise his religion openly. Al-Māwardī said: “If a Muslim is able to practise his religion openly in one of the lands of *kufṛ* then that land becomes by this *dār al-Islam* and to remain there is better than to leave because of what may be hoped for of others entering Islam.”²⁵

This opinion is the most all-encompassing in the issue but it is also the weakest of opinions in the way of proof and evidence. This is because the point is not the necessity of emigration but that of attaching a name to a country. If the matter was connected with the ability to practise one's religion openly, then many of the countries of Europe, and America nowadays would be more liable to have the name '*dār al-Islam*' attributed to them than many of the Arab countries.²⁶ Some Shāfi'ī scholars said that *dār al-Islam* never under any circumstances becomes *dār al-kufṛ* even if the non-believers attain control of it and remove the Muslims from it and proclaim the laws of *kufṛ* therein. This on the evidence of the *ḥadīth*: “Islam is the highest and nothing should be above it.”²⁷ There are no grounds in this *ḥadīth* for

²⁵ See: Ibn Ḥajar, *Fatḥ al-Bārī*, 7:229.

²⁶ See Ishāq b. 'Abd al-Raḥmān, *al-Durar al-saniyyah fī al-ajwibah al-najdiyyah*, 8:305-306.

²⁷ It is related by al-Daraqutnī, 3:252. Ibn Ḥajar says that the *sanad* is *ḥasan*; we (i.e Ibn Ḥajar) have related this *ḥadīth* in '*Fawā'id Abī Ya'lā al-Khalīl*' in this form except that an account is added to

this opinion because the meaning of the *ḥadīth* is the virtue of Islam over other than Islam.²⁸ Then Islam can be said to prevail when it is established²⁹, and in the issue we are discussing this is not the case so it cannot be said to prevail. Some scholars have interpreted this to mean the supremacy of Islam over the other religions in all matters.³⁰ There is no evidence in this *ḥadīth* which points to the fact that Muslims may not be vanquished, or that the rule of Islam may not cease in Muslim lands, when the case is that many lands have been lost by the Muslims, lands which are no longer mentioned in the atlases of the Muslims.

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the beginning of it that 'Āidh b. 'Amr arrived on the day of the conquest (of Mecca) along with Abū Sufyān b. Ḥarb. The Prophetic Companions said: Here are Abū Sufyān and 'Ā'idh b. 'Amr. The Messenger of Allah said: Here are 'Ā'idh b. 'Amr and Abū Sufyān, Islam is mightier than this; Islam prevails and nothing prevails over it'. . . then I found it amongst the sayings of Ibn 'Abbās as I had thought that Ibn Ḥazm had mentioned in '*al-Muḥallā*' saying: 'By way of Ḥammād b. Zayd, from Ayyūb, from 'Ikrimah, from Ibn 'Abbās who said: 'When a Jewess or a Christian woman entered Islam married to a Jew or a Christian they will be separated, Islam prevails and nothing prevails over it.' See Ibn Ḥajar, *Fath al-Bārī sharḥ Ṣaḥīḥ al-Bukhārī*, 3:220, *kitāb al-janā'iz*, *bāb 'idha aslam al-ṣabī*. See also al-Bayhaqī's *Sunan*, 6:205; and '*al-Aḥādīth al-Mukhtārah*' of al-Ḍiyā' al-Maqdisī 8:240. al-Ḍiyā' says: its *isnād* is *ḍā'if* because it is a relation of Ḥashraj b. 'Abd Allah b. Ḥashraj, from his father, from his grandfather. He was included by Ibn Abī Ḥātim in his '*al-Jarḥ wa al-ta'dīl*' 3:295 who said: 'I asked my father about him and he said: he is unknown (*laa yu'raff*) and he said the same thing about his son 'Abd Allah 5:40, and about his grandson that he was '*Shaykh*'. Ibn al-Mulaqqin said: "Its *isnād* is *wāḥī*. It is also related from al-Bayhaqī and al-Dhahabī that they said: 'The *ḥadīth* is *bāṭil*' (fabricated). *al-Badr al-munīr fī takhrīj al-ḥādīth al-Rāfi' al-Kabīr*'. 2:362; al-Zayla'ī also considered it to be *ḍā'if* in all of its sources. *Naṣb al-rāy* 3:213.

²⁸ See *al-Suyūṭī's commentary on the 'Sunan' of Ibn Mājah*, 2:196; al-Mubārakfūrī, '*Awn al-Ma'būd sharḥ Sunan Abū Dawūd*', 8:86.

²⁹ See: Ibn Qudāmah, '*al-Mughnī*' 10:267.

³⁰ See: al-Ṣan'ānī (d.1182/1768), *Subul al-salām*, 4:67.

(iv) The Fourth Opinion, held by Ibn Taymiyyah, which is a detailed look at the Issue. It is that: If a land is populated by Muslims then that land is part of *dār al-Islam*, and if populated by non-Muslims then it is not. If a land is populated by a group of Muslims and a group of non-Muslims then it falls under a third heading in which every individual is treated accordingly.

Ibn Taymiyyah, when he was asked whether the land of 'Mardin'³¹ was part of *dār al-ḥarb* or of *dār al-Islam*, said: "It is a combination of both; it is not of the status of *dār al-Islam* where the laws of Islam are in force because the army are Muslims. Nor is it of the status of *dār al-ḥarb* whose populace are *kuffār*. It falls under a third heading in which the Muslim is treated accordingly and those outside the *sharī'ah* of Islam are treated accordingly."³² In another place he said: "The description of a land as an abode of Islam or an abode of *kufr* is not because the land is intrinsically so, but rather due to accident by virtue of its population. If the non-believers were to inhabit the land it would become their abode (*dār*), and if Muslims were to inhabit it, it would become their abode (*dār*).” Then he gives examples of this such as when a Mosque becomes a church or a tavern or vice versa or when the non-believer

³¹ Mardin is a town in the south east of present-day Turkey near the Syrian border.

³² See: Ibn Mufliḥ 'Abd Allah b. Muḥammad al-Maqdisī 'Ādāb al-Sharī'ah' 1:211.

becomes Muslim or the Muslim becomes an apostate. All of these descriptions are accidental.³³

In conclusion we may say that there are three types of abode (*dār*): *dār al-Islam* purely, being every land in which the laws of Islam prevail and power resides in the religion of Allah whether the population are Muslims or non-Muslims; *dār al-kufr* purely, being every land in which the laws of *kufr* prevail and whose population are non-believers; then the *dār* which is a composite of the two in which each person is treated accordingly. This is the state of many Muslim lands today, where secularism prevails and the *sharī'ah* of Allah is combated, but where the population are Muslims who uphold the practices of the religion. In other words, there is consensus that there is more than one land: the land of Islam and the land of war, although scholars differ in their definitions. Thus, saying that there is no more than one land, and that the relationship between the state of Islam and the states of *kufr* is based on peace, which is a claim of some contemporaries,³⁴ is a new *ijtihād* that absolutely contradicts the *Sharī'ah*.

³³ See: Ibn Taymiyyah, *Majmū' al-Fatāwā*, 18:218.

³⁴ See Wahbah al-Zuhaylī, ' *Āthār al-ḥarb fī al-fiqh al-Islāmī*, p. 194-196.

Some issues which follow on from the dividing of the land into *dār al-Islam* and *dār al-ḥarb* are:

◆ EMIGRATION (*HIJRAH*)

The majority of scholars have asserted that emigration is mandatory from *dār al-kufr* to *dār al-Islam* on the condition that the person is not able to declare his religion in the land of *kufr*, and that he be capable of emigration. If he is able to declare his religion then emigration becomes recommended (*mustaḥabb*) but not mandatory. If he is not able to emigrate then it is no longer mandatory for him. Ibn Rushd the grandfather says: "It is mandatory on the basis of the Qur'ān and the Prophetic traditions and consensus (*ijmā'*) for a person who enters Islam in a land of *kufr* to migrate from it and enter the *dār* of Islam, and not to live amongst the polytheists, if he is not able to establish the sacred rights of his religion (*sha'ā'ir*) or is forced to accept the laws of *kufr*."³⁵

al-Khaṭīb al-Shirbīnī al-Shāfi'ī said: "It is recommended (*mustaḥabb*) for a Muslim who lives in *dār al-ḥarb* to emigrate to *dār al-Islam* if he is able to declare his religion openly, because he is a person who is obeyed amongst his people or he has a family which protects him and he does not fear oppression because of his religion.

Emigration is recommended in this case in order not to multiply their mass, nor to be tricked, nor to incline towards them. It is not mandatory for him to emigrate because he is able to declare his religion.

N.B.: emigration is recommended in this case unless he hopes his settlement would lead to the rise of Islam at which point it becomes preferable to remain. If he is able to resist and disassociate himself from *dār al-ḥarb* then it becomes mandatory for him to remain there as his actual place becomes *dār Islam* and if he were to emigrate then it would become *dār ḥarb* and this would be something prohibited.”³⁶

Ibn Ḥajar also said: “The saying of the Prophet ‘There is to be no emigration after the conquest’ means: the conquest of Mecca or what is more general than that, alluding to the fact that the ruling for other than Mecca in this matter applies also to Mecca and emigration from a land which the Muslims have conquered is not mandatory. As regards before the conquest of a land, the Muslims therein fall into one of three categories:

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³⁵ See: Ibn Qudāmah al-Maqdisī, ‘*al-Mughnī*, 13:149-152; al-Shawkānī, ‘*Nayl al-awṭār*, 8:178; *al-Mawsū‘a al-fiqhīyyah*, under the term: ‘Islam.’ 4:264.

³⁶ *Mughnī al-muḥtāj fī ḥall al-fāṣ al-Minhāj*, 6:55-56.

- (i.) The first is he who is able to migrate from that land being unable to declare his religion and carry out its requirements. Emigration is incumbent upon him.
- (ii.) The second is he who is able to migrate but he is able to declare his religion and carry out its requirements. Emigration is recommended (*mustaḥabb*) in order to increase the amount of Muslims in *dār al-Islam* and to aid them and to fight against the *kuffār* and to find sanctuary from their treachery and to be relieved from seeing objectionable things amongst them.
- (iii.) The third is he who is incapable of emigration on the grounds of captivity or illness and suchlike. It is permitted for him to remain there but if he were to force himself to leave then there would be reward for his deed.”³⁷

Ibn ‘Abd al-Barr said: “There is one sort of *hijrah* (emigration) which will remain until the end of this world. It is the case of a Muslim in *dār al-ḥarb* who was a non-believer then entered Islam. He is not allowed to remain in *dār al-ḥarb* and it is incumbent upon him to leave. How can a Muslim remain in a place where the laws of *kufṛ* are enforced upon him and both his word and his hand are the lowest while he is a Muslim? This is not permissible for anyone.”³⁸ Al-Nawawī reported that Qāḍī ‘Iyāḍ said: “The jurists are agreed that a Muslim woman should not travel except for

³⁷ ‘*Fatḥ al-Bārī*’, section on *jihād*, chapter: ‘*Lā hijrah ba’d al-fatḥ*’ 6:190.

the *ḥajj* pilgrimage or the *ʿumrah* pilgrimage unless she is with a *maḥram* (chaperone) and except in the case of *hijrah* (emigration) from *dār al-ḥarb*. Scholars have agreed that it is incumbent upon her to emigrate to *dār al-Islam* even if she does not have a chaperone with her. The difference is that her remaining in *dār al-kufr* is *ḥarām* if she is not able to declare her religion or fears for her religion or her self.”³⁹

The majority have brought forward the evidence of the *ḥadith*: “I am free of every Muslim who dwells amongst the polytheists. (They said): ‘O Messenger of Allah, Why?’ He said: ‘Their two fires should not see each other.’”⁴⁰ They also bring forward Allah’s saying : “The angels ask those they take [i.e. in death] while they are wronging themselves: ‘what were your circumstances?’ They reply: ‘We were oppressed on earth.’ They [i.e. the angels] say: ‘Was Allah’s earth not wide enough for you to have made *hijrah* [i.e. emigration] elsewhere in it?’ The shelter of such people will be Hell. What an evil destination! Except for those men, women and

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³⁸ *al-Tamhīd*: 8:390-391.

³⁹ See *al-Nawawī's commentary of Ṣaḥīḥ Muslim*, 9:104, 123 and 8:13.

⁴⁰ It was related by al-Tirmidhī in ‘*al-Siyar*’, *Dwelling amongst the Infidels*. no.1604 p. 1817; Abū Dawūd, in ‘*al-Jihād*’ *Prohibiting the killing of one who seeks refuge in prostration*, no.2645 p. 1418, from Qays b. Abī Ḥazim, from Jarīr b. ‘Abd Allah. al-Tirmidhī mentioned that most of the narrators relate this in a *mursal* form from Qays and do not say from Jarīr. Al-Bukhārī is quoted as having said that the correct form of the *ḥadith* is *mursal*. Al-Nasā’ī related the *mursal* form in ‘*al-Qassamah*’, chapter, *Retaliation for killing without an iron object*. no.4784 p.2397. The meaning of “Their two fires should not see each other” is that each of them is not to see the fire of the other if they light one because of distance between each other’s dwelling place.

children who really are oppressed and do not have any other possibility and are not guided to any way. It may well be that Allah will pardon them. Allah is Ever-Pardoning, Ever-forgiving.”⁴¹

The Ḥanafī school hold the opinion that *hijrah* has been abrogated by the *ḥadīth*: “There is to be no emigration after the conquest but there is *jihād* and intention.”⁴²

From the statements of the jurists, the conclusion can be drawn that emigration (*hijrah*) from *dār al-ḥarb* to *dār al-Islam* differs in accordance with differing situations.

(i.) Emigration is mandatory in the case where declaring one's religion is not possible and where emigration is possible. Among those things which make emigration mandatory are:

(a) Fear of religious oppression.

(b) Fear of inclining towards the unbelievers.

(c) Being influenced by them in the way of habits and morals and ways.

⁴¹ *Al-Nisā'*, 4:96-98.

⁴² *ṣaḥīḥ*. It was related by al-Bukhārī no.2783 p.224; Muslim no.1353 p. 1012; al-Tirmidhī no.1590 p.1815; al-Nasā'ī no.4175 p. 2361; all from 'Abd Allah b. 'Abbās.

(d) Fear of their treachery and plots.

(e) Fear that children might grow up with their morals and ways.

(f) Fear for one's honour and women.

(g) Fear of being coerced to adopt the laws of *kufṛ* in social interactions or transactions or other things.

(ii.) Remaining in *dar al-ḥarb* is mandatory when a person is able to disassociate himself and remain aloof from the non-believers and not be subject to their laws because his place becomes *dār Islam* and by his emigration from it would become *dār Kufr*.

(iii.) Emigration is recommended when a person is able to declare his religion or when what is hoped for from his remaining is inviting them to Islam or to strengthen the Muslims therein. Among those things which warrant remaining in a place and not emigrating are:

(a.) Calling to Allah and hoping for the spread of His religion.

(b.) Remaining detached from the polytheists due to personal, social or political power.

(c.) Being able to declare one's religion and to call others to it.

(d.) Being incapable of emigration because of weakness or lack of protection etc.

Hence, both the opinion that those Muslims who live in non-Muslim countries should migrate to Muslim countries immediately, and the opinion that it is permissible for anyone unconditionally to migrate from a Muslim country to a non-Muslim country, both are not specific enough in my opinion but rather it is necessary to look into each situation itself and to examine the pros and cons and rule according to each individual's situation and Allah knows best.

◆ Establishing the statutory punishments (*ḥudūd*)

Scholars hold three opinions regarding this issue:

(i) The first is that a person who commits an act which warrants a statutory punishment (*ḥadd*) or is subject to *qiṣāṣ* will not have it carried out upon him in *dār al-ḥarb* but it will be carried out upon his return to *dār al-Islam*. This is the opinion of Aḥmad, al-Awzā'ī, and Ishāq b. Rāhūyah.⁴³

(ii) The second opinion is that the punishment be carried out wherever he is. This is the opinion of Mālik⁴⁴, and al-Shāfi'ī.⁴⁵

⁴³ See Ibn Qudāmah, *al-Mughnī*, 13:172-173.

⁴⁴ Imam Mālik, *al-Mudawwanah*, 6:291; Ibn 'Abd al-Barr, *al-Kāfī fī fiqh ahl al-Madīnah al-Mālikī*, 1:470.

⁴⁵ *Al-'Umm*, 7:374.

(iii) Abū Ḥanīfah said that the *ḥudūd* punishments are not carried out in *dār al-ḥarb* and not upon return to *dār al-Islam*.⁴⁶

This third opinion is, I think, the weakest in the whole issue because of the corruption that follows on from it and because there is no genuine evidence for it. The first and second opinions are similar in that they agree upon the fact that the punishments should be carried out and the difference is regarding the postponing of carrying it out hoping for the common good or fearing corruption. This opinion has some veracity in addition to there being some supporting evidence for it in certain traditions which are not free of weakness. Among these traditions is the saying of 'Umar b. al-Khaṭṭāb: "The leader of an army or a raiding party is not to flog a Muslim man by way of mandatory punishment while he is fighting until they return home so that the man is not overcome by the zeal of Satan and attaches himself to the non-believers."⁴⁷

⁴⁶ See al-Zayla'ī 'Uthmān b. 'Alī, *Tabayyīn al-ḥaqā'iq*, 3:182, Ibn Nujaym al-Ḥanafī, *al-Baḥr al-rā'iq*, 5:18.

⁴⁷ *ḍa'if*. It was related by Sa'īd b. Manṣūr in 'al-Sunan' 2:196 no.2500, from Ismā'il b. 'Ayyāsh, from al-Aḥwaṣ b. Ḥakīm al-Ḥimṣī, from his father Ḥakīm b. 'Umayr b. al-Aḥwaṣ al-Shāmī al-Ḥimṣī, that 'Umar b. al-Khaṭṭāb . . . etc. This *isnād* contains Ismā'il b. 'Ayyāsh of whom we have already spoken in *ḥadith* no.9. Ibn Ḥajar said of al-Aḥwaṣ that he was of a weak memory (*ḍa'if al-ḥifẓ*). See 'al-Taqrīb' p.121. His father is 'Ṣudūq yahim' (was deluded) 'al-Taqrīb' p.266. Then the narration from 'Umar and 'Uthmān is cut off and he did not hear from those two as Ibn Ḥajar has mentioned quoting Ibn Khalfūn. See 'Tahdhīb al-Tahdhīb' 1:475. Hence, the *isnād* is *ḍa'if* and it is no wonder that al-Shāfi'ī rejects it. See al-Bayhaqī 'al-Sunan al-kubrā' 9:105.

Al-Bayhaqī related that al-Shāfi'ī said: Abū Yūsuf said that some of his *shaykhs* related to him that Makḥūl and Zayd b. Thābit both said: "The *ḥudūd* are not to be carried out in *dār al-ḥarb* for fear that those subject to them may join the enemy."⁴⁸

Al-Shāfi'ī considered this to be weak in both *isnād* and meaning. As for the *isnād*, in it is the unknowing (*jahālah*) of the *shaykhs* of Abū Yūsuf and the disconnection (*inqiṭā'*) between Makḥūl and Zayd, because Makḥūl did not live to see Zayd b. Thābit. As regards the content, al-Shāfi'ī said: "As for his saying 'he will join the polytheists', this will be more miserable for him and whoever fails to carry out a punishment fearing that the felon will join the polytheists has done so in the border lands which are next to *dār al-ḥarb*. This pretext can also be found in the lands of Islam, meaning that the felon may flee to the lands of the polytheists, and this leads to the breakdown of the *ḥudūd* and to them not being carried out and no Muslim has ever said this opinion."⁴⁹

The Ḥanafī school, in this issue and in other issues in which the majority of the people of knowledge and the authentic and clear texts of the Book and the *Sunnah* differ, have based their opinion upon the fact that the laws of Islam cannot be

⁴⁸ al-Bayhaqī, *al-Sunan al-kubrā*, 9:105.

⁴⁹ See Imam Mālik, *al-Mudawwanah*, 6:291; al-Shāfi'ī, *al-Umm*, 4:224-248; Ibn Ḥazm, *al-Muḥallā*, 11:136; Ibn Qudāmah, *al-Mughnī*, 8:215.

enforced in *dār al-ḥarb*. Hence, the *ḥudūd* punishments are not to be carried out there because these punishments are to be carried out by the Imam (Caliph). So if two Muslims were to enter *dār al-ḥarb*, and one was to kill the other, he would not warrant mandatory punishment but only be subject to reparation.⁵⁰ Abū Ḥanīfah hold that if transgressors fortify in a land, the *ḥadd* is not mandatory upon any of them nor upon whoever is with them like traders or prisoners because they are outside the abode of the Imam and are like those in *dār al-ḥarb*. He (Abū Ḥanīfah) also said that if a *ḥadd* punishment was incumbent upon a *dhimmī* or an apostate who then entered *dār al-ḥarb* and then returned to *dār al-Islam* the *ḥadd* would no longer be obligatory.⁵¹ These issues and others are all baseless opinions that go against the authentic traditions and sound intellect.

Ibn Qudāmah says: "It is not a condition for *qiṣāṣ* that the killing take place in *dār al-Islam*, if a person kills a Muslim in *dār al-ḥarb* intentionally, with knowledge that he is a Muslim, then retaliation is mandatory whether the person has emigrated or not. This was also said by al-Shāfi'ī. Abū Ḥanīfah said that *qiṣāṣ* is not obligatory for a killing outside *dār al-Islam*; and if the victim had not emigrated, then neither

⁵⁰ Mīrghīnānī 'Alī b. Abī Bakr al-Ḥanafī, *al-Hidāyah sharḥ bidāyat al mubtadī* 2:466.

⁵¹ See al-Zayla'ī 'Uthmān b. 'Alī, *Tabyīn al-ḥaqā'iq*, 3:182, Ibn Nujaym al-Ḥanafī, *al-Baḥr al-rā'iq*, 5:18, Ibn Qudāmah, *al-Mughnī* 8:215.

qiṣāṣ nor reparation was liable, whether the killing was intentional or accidental. If the victim had emigrated then returned to *dār al-ḥarb*, that it would be the same as two Muslim men who entered *dār al-ḥarb* safely and one killed the other. He would be liable for reparation (*diyyah*) but not retaliation (*qawad*). If a person were to kill a Muslim prisoner in *dār al-ḥarb*, only reparation would be liable whether the killing was intentional or accidental.' We have the evidence of the Qur'ānic verses and the reports that we have mentioned; and because he would have killed a person of equal standing intentionally and criminally then retaliation would be obligatory as if he had killed him in *Dār al-Islam*, and because *qiṣāṣ* is mandatory in every abode in which there is an Imam, and even if there is no Imam, like *dār al-Islam*.⁵²

Ibn Qudāmah said also: 'If the transgressors commit a crime which warrants the *ḥadd* punishment while they resist, then they are overpowered, and the *ḥudūd* of Allah should be carried out regardless of whatever territory this took place in. This was the opinion of Mālik, al-Shāfi'ī and Ibn Mundhir. Abū Ḥanīfah said that if they resist in a place, then none of them are liable for *ḥadd* nor those who are within their

⁵² 'al-Mughnī' 8:215.

territory like traders or prisoners because they are beyond the jurisdiction of the Imam and are similar to those in *dār al-ḥarb*.⁵³

Ibn Qudāmah also said: "If a *dhimmī* or an apostate is liable for a *ḥadd* punishment and he enters *dār al-ḥarb* and then returns, he will still be liable. Abū Ḥanīfah said that he would not be liable. We say that it is a mandatory *ḥadd* which is not voided by entering *dār al-ḥarb*, this is as same as a Muslim who enters (i.e. *dār al-ḥarb*) by sanctuary.⁵⁴

◆ USURY (*RIBĀ*)

Regarding the obligatory acts and the boundaries set by Allah, the principle is that they are compulsory in every time and place, and are not meant for one specific land rather than another, and are not confined to one specific era. Hence, the majority of the people of knowledge have not attached the laws of the *sharī'ah* to one specific land or time-span. The exceptions are those opinions to be found from some scholars which are ignored by the generality of Muslims, and have neither genuine legal evidence to support them, nor clear intellectual reasoning for them. It is not correct to attribute these opinions to the religion of Islam as if they were the laws of Allah, but

⁵³ 'al-Mughnī 9:14.

⁵⁴ 'al-Mughnī 9:84.

rather, out of justice and fairness, they should be attributed to whoever formulated them. They are no more than the opinions and pondering of human beings who may sometimes be correct and at other times err. In this issue (usury) also there is a paucity of those who have fully comprehended it and I have mentioned in a previous topic a group of them. Amongst these opinions which are far from reality is the opinion that usury is permitted in *dār al-ḥarb*. I will in this discussion examine what the '*ulamā*' have said in this issue, and what the truth is in this matter:

Ibn Qudāmah said: 'Usury is prohibited in *dār al-ḥarb* in the same way that it is prohibited in *dār al-Islam*. This is the view of Mālik, al-Awzā'ī, Abū Yūsuf, al-Shāfi'ī, and Ishāq. Abū Ḥanīfah said that usury is not considered to exist between a Muslim and a non-Muslim in *dār al-ḥarb*. He is also reported as having said regarding two Muslims who entered Islam in *dār al-ḥarb* that the concept of usury does not exist between them because of what Makḥūl has reported that the Prophet said: 'The concept of usury does not exist between the Muslims and non-Muslims in *dār al-ḥarb*', and because their [i.e. the *ḥarbīs* (non-Muslims beyond *dār al-Islam*)] wealth is *mubāḥ* [i.e. free for Muslims to own], and it has only become prohibited by the existence of a state of sanctuary (*amān*) in *dār al-Islam* and otherwise it is freely available.

We [i.e. the Ḥanbalīs] have the evidence of the following Qur'anic verses: "Those who practice *ribā* will not rise from the grave except as someone driven mad by

Shaytan's touch. That is because they say: 'Trade is the same as *ribā*' But Allah has permitted trade and He has forbidden *ribā*'⁵⁵, "You who have '*īmān*' have *taqwā* of Allah and forgo any remaining *ribā* if you are mu'minūn."⁵⁶. The generality of reports validate the prohibition of *tafāḍul* [i.e. increasing one part over another part between things which should only be exchanged like for like]. It is also in the *ḥadīth*: 'Whoever gives an increase or accepts an increase is a usurer' which is in general terms, as are the majority of the *aḥādīth*. As usury is prohibited in *dār al-Islam* it is also prohibited in *dār al-ḥarb*, as is usury amongst Muslims. Their report is in a *mursal* form and we do not know its authenticity but it is probable that forbidding it is what is meant. It is not permissible to neglect what has been prohibited by the Qur'ān and what the *sunnah* has made clear and what has been prohibited by the consensus of scholars on the basis of an anonymous report not to be found in any *ṣaḥīḥ* or *musnad ḥadīth* nor in any reliable book. The *ḥadīth* is also *mursal* and *muḥṭamal* [i.e. accepts more than one meaning], and it is possible that what is meant by '(Let there be) no usury' is the same as the Qur'ānic verse: '*lā rafatha wa la fusūq wa lā jidāl fī al-ḥaj*' '(Let there be) no sexual intercourse, no wrongdoing, nor

⁵⁵ *Al-Baqarah* 2:275.

⁵⁶ *Al-Baqarah* 2:278.

any quarrelling during *ḥajj*.⁵⁷ The *ibāḥah* (permission) that they have mentioned is in contradiction to when the non-Muslim enters *dār al-Islam* in which case his wealth will be *mubāḥ* except that which sanctuary forbids.⁵⁸

al-Nawawī also says: 'Usury in *dār al-ḥarb* has the same position as it has in *dār al-Islam*. This was the view of Mālik, Aḥmad, Abū Yūsuf, and Muḥammad b. al-Ḥasan. It is reported from Abū Ḥanīfah that he said: 'Usury in *dār al-ḥarb* is prohibited amongst Muslim emigrants, but between non-Muslims (*ḥarbīs*) and non emigrant Muslims there is no usury.' He [i.e. Abū Ḥanīfah] also said: 'The usurious contract made by two *dhimmīs* in *dār al-Islam* is invalid.' The criterion in his opinion is the *dār* whereas our criterion is the one who makes the contract. Abū Ḥanīfah argued with the *ḥadīth* of Makḥūl that the Prophet said: 'There should be no usury between a Muslim and a non-Muslim in *dār al-ḥarb*' and with the fact that the wealth of the people of *dār al-ḥarb* is permissible for the Muslim without the need for a contract, although a contract would be more appropriate. Our [i.e. Shafī'īs] evidence is the generality of the proofs prohibiting usury and that everything that is prohibited in *dār al-Islam* is also prohibited in *dār al-kufr* as are other vices and sins.

⁵⁷ *Al-Baqarah* 2:197.

⁵⁸ Ibn Qudāmah, '*al-Mughnī*', 6:98-99.

Because it is an invalid contract, then it can not make what is concluded legal for him. This is the same as an invalid marriage contract. I [i.e. al-Nawawī] say: If Abū Ḥanīfah agrees upon the invalidity of this contract in *dār al-ḥarb* then he has no evidence. As for the *ḥadīth* of Makḥūl, it is *mursal* (disconnected), even supposing that the *isnād* to Makḥūl is authentic. It is also probable that what is meant by '*lā*' in the *ḥadīth* is that it is a particle of prohibition not of negation. Then the desired meaning is that the prohibition of usury between Muslims and non-Muslims is the same as it is between Muslims. This probability is supported by the general evidence that forbids usury. As for the legality of their [i.e. the *ḥarbīs*,] wealth if he [i.e. a Muslim] enters their land under their protection, this is not permissible. The same goes for the invalid contract. If it were supposed that the state of sanctuary is lifted, then this reasoning is not correct because, if the *ḥarbī* enters *dār al-Islam*, his wealth is lawful without a contract and is not lawful with an invalid contract. Then not everything that is lawful without a contract is lawful with an invalid contract, as in women that are made lawful through being taken prisoner (*saby*) and are not made lawful with an invalid contract. Amongst the evidence that they cite in their argument that there is to be no usury in *dār al-ḥarb* is that al-'Abbās b. 'Abd al-Muṭallib was a Muslim before the conquest of Mecca. When al-Ḥajjāj b. 'Iilāt entered Mecca upon the conquest of Khaybar and gathered there in a long well

known account,⁵⁹ the speech of al-‘Abbās b. ‘Abd al-Muṭallib showed that he was a Muslim at that time. Then the Prophet said on the day of the conquest of Mecca: ‘The first usury I will abrogate is the usury of al-‘Abbās b. ‘Abd al-Muṭallib. This included some usury from after him having entered Islam until the conquest of Mecca. So if the usury that is between a Muslim and a *ḥarbī* is abrogated then the usury of al-‘Abbās would have been abrogated on the day he became Muslim. The answer is that al-‘Abbās had some usury in the *jāhilīyah* [i.e. period before he became Muslim.] There is no proof that he continued in usurious practices after he became a Muslim. Having said that he continued, then this may have been because he did not know that it was prohibited. The Prophet wanted to establish this principle [abrogation of *ribā*] from that day forth.”⁶⁰

If this is the case, then there is no wonder that Qāḍī Abū Yūsuf opposed his master Abū Ḥanīfah.⁶¹

⁵⁹ See al-Ṭabarānī, *al-Muʿjam al-Kabīr*, 3:220, Ibn Ḥajar al-‘Asqalanī, *al-ʿIṣābah fī tamyiz al-ṣaḥābah*, 1:312.

⁶⁰ Al-Nawawī, *al-Majmūʿ*, 10:488.

⁶¹ See al-Shāfiʿī, *al-Umm* 7:379-380; Muḥammad b. Aḥmad al-Sarkhasī al-Ḥanafī, *Sharḥ al-siyar al-kabīr*, 4:1489; Ibn al-‘Arabī al-Mālikī, *Aḥkām al-Qurʾān*, 1:649-650; Abū Bakr Masʿūd b. Aḥmad al-Kāsānī al-Ḥanafī, *Badāʾiʿ al-ṣanāʿi fī Tārīkh al-Sharāʿi*, 7:133-134.

It is clear from an examination of the evidence of the two groups that what Abū Ḥanīfah says is nothing but an opinion not based on any genuine legalistic text. The consequences of this opinion is of great corruption of the ethics of the Muslims and a transaction which does not fit in with the greatness of Islam and its legalistic eminence. This opinion also leads to diverting the people from accepting Islam and adopting it. Allah Almighty has made plain in the Qur'ān that the Jewish and Christian priests used to divert people from the way of Allah because of their bad dealings with people: "You who have *īmān*! Many of the rabbis and monks devour people's property under false pretences and bar people from access to the way of Allah.." ⁶² The remainder of the '*ulamā*' bring forth the supporting evidence of clear Qur'ānic verses on the subject of the prohibition of usury, not only for Muslims but even for others like Jews and Christians. On the basis of intellect and analogy, just as prayer, alms and fasting are not made invalid in *dār al-ḥarb*, neither are the *ḥudūd* (punishments) and the other prohibitions. Whatever is prohibited in *dār al-Islam* is also not permitted in *dār al-ḥarb*; including adultery, usury, wine drinking etc. This reasoning is clear. ⁶³

⁶² *Al-Tawbah*, 9:34.

⁶³ See for more details: Ṣalāḥ al-Ṣāwī, *Waqfāt hādī'ah ma'a fatwā 'ibāḥat alqur'ūḍ al-ribawīyah lishirā' al-masākin fī al-mujtama'āt al-gharbiyyah*. p.20 ff.

[Issue 55] In war, aid is not sought from a *kāfir* (non-believer)

Abū Ḥanīfah and al-Shāfi'ī said that aid can be sought from him.

Al-Shāfi'ī added: If their aid is needed and they have a good opinion of the Muslims.

- [134] Aḥmad: from Abū al-Mundhir Ismā'il b. 'Umar, from Mālik, from al-Fuḍayl b. Abī 'Abd Allah, from 'Abd Allah b. Niyār al-Aslamī, from 'Urwah that 'Āishah said: "A man followed the Messenger of Allah and said: 'I am following you so I can fight with you.' So the Messenger of Allah said: 'Do you believe in Allah and His Prophet?' The man said: 'No'. He [i.e. the Prophet] said: 'We do not seek the aid of a polytheist (*mushrik*). So he said once again: 'Do you believe in Allah⁶⁴ and His Messenger?' The man said: 'Yes.' So the Prophet set off and the man followed him."⁶⁵

Muslim related this.

- [135] Mustalim b. Sa'id, from Khubayb b. 'Abd al-Raḥmān, from his father, that his grandfather said: "I went along with another man of my tribe to the

⁶⁴ Sheet 160/B.

⁶⁵ *ṣaḥīḥ*. It was related by Aḥmad 6:67-68; Muslim In *al-Jihād*; Chapter 'The abhorrence of seeking aid from a *kāfir* in military raids.' 1817 p. 1004; Abū Dāwūd 2732 p. 1426; al-Tirmidhī 1558 p. 1812; Ibn Mājah 2832 p. 2648; al-Bayhaqī, *al-Sunan al-kubrā*, 9:36-37.

Messenger of Allah when he intended a military raid and this was before we had accepted Islam. We said: 'We are ashamed that our people are to do battle while we are not with them.' He [i.e. the Prophet] said: 'Are you Muslims?' We said: 'No.' So he said: 'We do not seek the aid of polytheists.' So we accepted Islam and did battle along side him."⁶⁶

The others argue using:

[136] Ibn 'Uyaynah, from Yazīd b. Yazīd b. Jābir, that al-Zuhrī said: "The Prophet sought the aid of some Jewish people in his war and gave them a share of the booty."⁶⁷

[137] Ibn al-Mubārak, from Ḥaywah b. Shurayḥ, that al-Zuhrī said: "The Prophet let some Jewish people take part in a campaign with him in the same way as he did the Muslims."⁶⁸

I [i.e. al-Dhahabī] say: the *marāṣil* of al-Zuhrī are *ḍa'īfs*.

⁶⁶ *ṣaḥīḥ*. It was related by Aḥmad 3:454; Ibn Abī Shaybah Abū Bakr 'Abd Allah b. Muḥammad, *al-Muṣannaf*, 6:491, Ibn Sa'd, *al-Ṭabaqāt*, 3:534-535, al-Ḥākim Muḥammad b. 'Abd Allah, *al-Mustadrak*, 2: 121-122 and he considered it *ṣaḥīḥ*.

⁶⁷ *ḍa'īf*. It was related by Abū Dāwūd, *al-Marāṣil*, no. 281 p. 224; Ibn Abī Shaybah Abū Bakr 'Abd Allah b. Muḥammad, *al-Muṣannaf*, 6:491; Sa'īd b. Manṣūr 2:284.

[Issue 56] Neither an old man, nor a monk, nor a chronically ill man, nor a blind man are to be killed except when they are part of some ploy by the enemy.

This is in opposition to the opinion of al-Shāfi'ī.

[138] al-Layth, from Nāfi', that Ibn 'Umar said: "A woman was found killed during one of the Messenger of Allah's military campaigns. He deplored this and prohibited the killing of women and children."⁶⁹ Al-Tirmidhī considered this *ṣaḥīḥ*.

[Issue 57] If the polytheists gain possession of some of the wealth of Muslims they do not own it.

Abū Ḥanīfah and Mālik said that they do own it. Our evidence:

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⁶⁸ *ḍa'īf*. It was related by Abū Dāwūd, *al-Mar'āsīl*, no. 282 p. 224; Ibn Abī Shaybah Abū Bakr 'Abd Allah b. Muḥammad, *al-Muṣannaḥ*, 6:491.

⁶⁹ *ṣaḥīḥ*. It was related by al-Tirmidhī In *al-Siyar*; Chapter 'Regarding the killing of women and children.' no.1569 p.1813; al-Bukhārī, *al-jāmi' al-ṣaḥīḥ*, 3014 p. 242; Muslim 1744 p. 986; Abū Dāwūd 2668 p. 1420; Ibn Mājah 2841 p. 2648; Mālik *al-Muwatta'*, trsd. Bewley p. 174; Aḥmad 2:22, 23, 76-77, 91.

- [139] (Muslim): Ayyūb from Abū Qilābah, from Abū al-Muhallab, that ‘Imrān b. Ḥuṣayn said: “al-‘Aḏbā’, the camel of the Prophet, was owned by a man of the tribe of ‘Uqayl. It was considered to be of the forerunner camels. He [i.e. the man of the tribe of ‘Uqayl] was taken prisoner and the camel was taken with him. The Messenger of Allah held it for himself. Then some of the polytheists raided the pastures of Madīnah where the beast was, and they captured a Muslim woman. When they reached their houses they used to descend from their camels in their courtyards. One night, the captive woman arose after they were asleep and went to the camels which would each grumble until she came across al-‘Aḏbā’, which was a docile beast so she mounted it and directed it towards Madīnah, and made an oath that if Allah would deliver her from danger she would sacrifice it. When she arrived in Madīnah, the camel was recognised, and they said: ‘It is the camel of the Messenger of Allah.’ The Prophet was informed of her oath or she went to him and informed him. He said: ‘What an evil reward she has given it! Has Allah saved her on this camel for her to sacrifice it?’ Then he said: ‘An oath taken in disobedience of Allah should not be fulfilled, nor regarding that which is not your property.’”⁷⁰

⁷⁰ *ṣaḥīḥ*. It was related by Aḥmad 4:430, 433; Muslim in *al-nadhr*; Chapter ‘An oath taken in disobedience of Allah is not fulfilled’ no. 1641 p.965; Abū Dāwūd 3316 p. 1471; al-Nasā’ī 3316 p. =

- [140] (Abū Dāwūd): ‘Ubayd Allah⁷¹ from Nāfi‘, that Ibn ‘Umar said: “A horse of mine went and was taken by the enemy, then the Muslims overcame them and it was returned to him [i.e. Ibn ‘Umar] during the time of the Prophet. A slave of his [i.e. Ibn ‘Umar] escaped and joined with the Byzantines, then the Muslims overcame them and he was returned to him by Khālīd b. al-Walīd after the death of the Messenger of Allah.”⁷²

The other schools argued using:

- [141] Al-Ḥasan b. ‘Umārah, from ‘Abd al-Malik, from Ṭāwūs, from Ibn ‘Abbās, that the Prophet said concerning that which the enemy obtains and the Muslims retrieve: “If its owner finds it before it is apportioned out then he has the greater right to it. If he should find it after it has been apportioned then if he wishes he may take it by paying the price of it.”⁷³

Ibn ‘Umārah is *matrūk*.

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3843 in short without mentioning the story as well as Ibn Mājah did in no. 2124 p. 2604; al-Dāraquṭnī 4:182-183.

⁷¹ Sheet 161/A.

⁷² *ṣaḥīḥ*. It was related by Abū Dāwūd In *al-jihād*; Chapter 'The possessions taken by the enemy from Muslims then retrieved by its owner as booty' no.2699 p.1423; al-Bukhārī, *al-jāmi‘ al-ṣaḥīḥ*, 3067 p. 247 ; Ibn Mājah 2847 p. 2648.

[Issue 58] If the commander attacks a fortification, it is not permitted to open any floodgates to drown the enemy, nor to cut down their trees except in one of two circumstances: (i) that they do a similar thing to us, or (ii) that we need to cut down trees.

Al-Shāfi'ī permitted this unconditionally. Our companions related:

[142] When the Prophet sent forth an army he said: "Do not destroy any springs and do not cut down any trees except those which prevent you from fighting."⁷⁴

The other schools argue using the *ḥadīth* of:

[143] Nāfi', from Ibn 'Umar: "The Prophet set fire to al-Buwayrah,⁷⁵ the date palms of the tribe of al-Naḍīr and cut them down. Then Allah revealed the verse: 'Whatever palm-trees you cut down, or left standing upright on their

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⁷³ *ḍa'if jiddan* (very weak.) It was related by al-Dāraqūṭnī 4:114-115.

⁷⁴ *ḍa'if*. It was related by al-Bayhaqī, *al-Sunan al-kubrā*, 9:90-91. He said: "There is weakness and disconnection in the *isnād* but it can be strengthened by the other transmissions and *'āthār*."

⁷⁵ A place located between Madīnah and Taymā'. It also called al-Buwaylah. See Ibn Kathīr, *al-Bidāyah wa al-nihāyah*, 5:540; Ibn Hajar, *Fatḥ al-Bārī*, 7:333.

roots, it was done by Allah's permission in order to disgrace the deviators.'^{76,77}

- [144] Aḥmad: from Wakī', from Ṣāliḥ b. Abī al-Akhḍar, from al-Zuhrī, from 'Urwah, that 'Usāmah b. Zaid said: "The Messenger of Allah sent me to a dwelling known as Ubnā, and he said: Go there in the morning and set fire to it."⁷⁸

7.1 BOOTY

[Issue 59] The Imam has a choice regarding prisoners of war of either killing them, enslaving them, ransoming them, or freeing them outright.

Abū Ḥanīfah said that ransoming or freeing them outright is not permitted.

⁷⁶ *al-Ḥaṣhr*: 59:5.

⁷⁷ *ṣaḥīḥ*. It was related by al-Tirmidhī 1552 p. 1811; Al-Bukhārī no.2326 p. 182, Muslim no.1746 p. 987; Abū Dāwūd 2615 p. 1416; Ibn Mājah 2844 p. 2648; Aḥmad 2:8, 52, 123, 140.

⁷⁸ *ḍa'īf*. It was related by Aḥmad 5:205, 209; Abū Dāwūd 2616 p. 1416; Ibn Mājah 2843 p. 2648. In the *isnād* there is Ṣāliḥ b. Abī al-Akhḍar, the narrator from al-Zuhrī. Ibn Ḥajar al-'Asqalānī labeled him *ḍa'īf*. See *Taqrīb al-Tahdhīb*, p.443.

Our evidence is: Allah Almighty's says: "... and set them free or ransom them..."⁷⁹.

- [145] Al-Layth relates from al-Maqburī that Abū Hurayrah said: "The Messenger of Allah sent some cavalry towards Najd. They brought a man from the tribe of Banū Ḥanīfah named Thumāmah b. 'Uthāl, the leader of the people of Yamāmah and tied him to a pole. The Messenger of Allah went out to him and said: 'What do you have, Thumāmah?' He said: 'I have good, Muḥammad; If you kill me you kill one who has shed blood, and if you do me a kindness you do so to one who is grateful, and if you require money then ask and you will be given whatever you ask.' So the Messenger of Allah left him until the next day⁸⁰ and then said to him: 'What do you have, Thumāmah?' He said: 'What I have already told you.' So the Prophet left him again until the next day and asked him: 'What do you have, Thumāmah?' and he repeated his previous words, so the Messenger of Allah said: 'Set Thumāmah free.' So he was taken to a date palm near to the mosque where he performed his ablutions and then he entered the mosque

⁷⁹ *Muḥammad*: 47:4.

⁸⁰ *Sheet* 161/B.

and said: 'I testify that there is no deity but Allah, and I testify that Muḥammad is the Messenger of Allah.'⁸¹

The Prophet also freed Abū 'Azzah al-Jumaḥī, and ransomed the prisoners on the day of the battle of Badr.

[146] (Abū Dāwūd): From Abū al-Sha'thā', that Ibn 'Abbās said: "The Messenger of Allah set the ransom for the polytheists on the day of Badr at four hundred [dirhams]."⁸²

[147] Aḥmad: from 'Alī b. 'Āṣim, from Ḥumayd, that Anas said: "The Prophet consulted the people regarding the prisoners on the day of Badr. Abū Bakr said: 'We think you should grant them amnesty, and accept a ransom for

⁸¹ *ṣaḥīḥ*. It was related by Aḥmad 2:246-247; Al-Bukhārī no. 4372 p. 358; Muslim no. 1764 p. 991; Abū Dāwūd 2679 p. 1421.

⁸² *ḍa'if*. It was related by Abū Dāwūd In *al-Jihād*; Chapter 'Ransoming prisoners for money' no.2691 p.1422; Muḥammad b. 'Abd Allah, *al-Mustadrak*, 2:125,140. al-Ḥākim al-Bayhaqī, *al-Sunan al-kubrā*, 9:68. al-Ḥākim said: "This is a *ṣaḥīḥ ḥadīth* which is in accordance to the conditions of al-Bukhārī and Muslim." Al-Dhahabī also agreed with him. In fact, this is an inexact verdict because of Abū al-'Aanbas, one of the transmitters of the *ḥadīth*. He only exists in *al-Sunan* of Abū Dāwūd. It is agreed that the Prophet accepted ransom the day of Badr. However, the sum differs from this. According to what 'Abd al-Razzāq al-Ṣan'ānī and al-Ṭabarānī relate from 'Ikrimah, from Ibn 'Abbās, the ransom was 4000 dirhams. See *al-Muṣannaf*, 5:206 no. 9394 and *al-Mu'jam al-Kabīr*, 11:406 no. 12154; *al-Mu'jam al-Awṣaṭ*, 4:23 no. 3027.

them.' Thus the Prophet granted them amnesty and accepted a ransom for them."⁸³

- [148] (al-Tirmidhī): Ayyūb from Abū Qilābah, from his uncle, that 'Imrān said: "The Prophet ransomed a man from the polytheists in return for another man [i.e. a Muslim]."⁸⁴

The Imam (Caliph) has four options regarding prisoners of war; putting them to death, enslaving them, ransoming them, or freeing them unconditionally. The author mentions that Abū Ḥanīfah disagrees in this by disallowing ransoming and unconditional freedom, leaving the Imam with the two options of killing the prisoners or enslaving them. Then he (the author) mentions the evidence of the majority in support of the options of ransoming and unconditional freedom. This is one of the issues wherein there is much argument and uncertainty. Certain Muslims recently have tried to conceal the truth of the matter out of fear or ignorance, or for other reasons to which I have alluded more than once. In this discussion, I will

⁸³ *ḍa'if*. It was related by Aḥmad 3:243 from 'Alī b. 'Āṣim b. Ṣuhayb, from Ḥumayd, from Anas. 'Alī was accused liar by Ibn Ma'īn and others. Imam Aḥmad claimed that he did not has the intention to lie, he rather, was unintentionally slipping into errors. See al-Haythamī 'Alī b. Abī Bakr, *Majma' al-zawā'id*, 6:118; Ibn Ḥajar al-'Asqalānī, *Tahdhīb al-Tahdhīb*, 3:173-175.

⁸⁴ *ṣaḥīḥ*. It was related by al-Tirmidhī In *al-Siyar*; Chapter '*Regarding the killing of prisoners and ransoming*'; no.1568 p.1813; Aḥmad 4:426-427, 432; Ibn Abī Shaybah Abū Bakr 'Abd Allah b. Muḥammad, *al-Muṣannaf*, 6: 499. al-Tirmidhī authenticated the *ḥadīth*.

attempt to deal with the legal issues using the main sources; namely the Qur'ān, the authentic *sunnah*, and *'ijmā'* (scholarly consensus), and in gaining an understanding of this will rely upon the basic reference works and the books of the classical jurists and the Imams of the juridical schools, together with an examination of the evidence.

◆ Killing prisoners of war

The four Imams and other scholars hold the opinion that killing a prisoner is permitted. They support this view with evidence from the Qur'ān: "It is not fitting for a Prophet to take captives until he has let much blood in the land"⁸⁵, and "Kill the *mushrikūn* wherever you find them"⁸⁶, and "So strike their necks and strike all their finger joints."⁸⁷ The Qur'ānic verses in this regard are many. They also bring evidence from the *sunnah* of the Prophet killing 'Abd Allah b. Khaṭal, when he said on the day of the conquest of Mecca: "Kill him even if you find him clinging to the drapes of the Ka'bah"; and also 'Uqbah b. Abī Mu'ayṭ, and al-Naḍr b. al-Ḥārith who were both prisoners of the battle of Badr. Some scholars have disputed in this issue

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Notice: The *ḥadīth* in all above-mentioned sources differs from the version mentioned by the author. It is reported: "The Prophet ransomed a man from the polytheists in return for two men." In some version it is added: "from *banī* 'Aqīl [i.e. Muslims from the tribe of 'Aqīl.]"

⁸⁵ *Al-Anfāl*; 8:67.

⁸⁶ *Al-Tawbah*; 9:5.

saying that the killing of prisoners is not permitted. Amongst those who have been quoted as having said this are al-Ḥasan al-Baṣrī, and 'Aṭā' b. Abī Rabāḥ as has been reported by 'Abd al-Razzāq in 'al-Muṣannaf' saying:

Chapter: Regarding those who did not kill prisoners and hated to do so

- (1.) Muḥammad b. 'Adī related from Ibn Jurayj, from 'Aṭā', that he disapproved of prisoners being killed.
- (2.) Abū Khālīd al-Aḥmar related from Ibn Jurayj, from 'Aṭā', that he used to say: "A prisoner should not be killed."
- (3.) Muḥammad b. Abī 'Adī, related that Ash'ath said: "al-Ḥasan disapproved of prisoners being killed."
- (4.) Ghundar related from Shu'bah, from Khālīd b. Ja'far, that al-Ḥasan said: "al-Ḥajjāj was brought a prisoner and he said to 'Abd Allah b. 'Umar: 'Go and kill him.' Ibn 'Umar said: 'This is not what we have been ordered, for Allah has said: "And when you have overcome them then make fast their bonds, and then free them or ransom them."'"
- (5.) Wakī', related from Jarīr b. Ḥāzim that al-Ḥasan said: "Ibn 'Āmir sent a prisoner to Ibn 'Umar when he was in Persia or Iṣṭakhr (an ancient Iranian city built

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⁸⁷ *Al-Anfāl*; 8:12.

on the remains of Perseopolis) for him to kill him. Ibn 'Umar said: 'No, not while he is in bonds.'⁸⁸

Ibn Rushd the grandfather quotes al-Ḥasan b. Muḥammad al-Tamīmī as relating that there was consensus amongst the Companions against the killing of prisoners.⁸⁹ However, I have not found this to be the case amongst the consensus of the Companions, and the action of the Prophet points to the falsity of this view. Although this view is in concord with international law, it is in contradiction to Islamic law which points to the permissibility of killing prisoners, but, as we have already mentioned, it is done by the Imam according to the common good and not motivated by revenge or bloodlust.

◆ Eenslavement

This is one of the issues which are often used by non-Muslims to revile Islam and make it distasteful to the people and to divert them from Islam. Also, some Muslims deny the system of slavery in Islam, and others consider that international law is sufficient to invalidate it. Both of these are errors. Slavery is established in Islam and has been mentioned in numerous Qur'ānic verses under the heading of 'the

⁸⁸ 'Abd al-Razzaq al-Ṣan'ānī, *al-Muṣannaf*, 7:674-675.

⁸⁹ See: Ibn Rushd, *Bidāyah al-mujtahid*, 1:382.

possessions of the right hand' meaning possession through slavery. The reason for enslavement is *jihād* practised by Muslims against the *kuffār* some of whom fall prisoner to the Muslims. Women and children become slaves of the Muslims simply by falling prisoner to them. Hence, the authentic and explicit *sunnah* prohibits the killing of women, children, and monks except when they themselves fight. In the case of male fighters, the Imam has certain options open to him as we have mentioned. It should be enough for us to accept this ruling that firstly it is from Allah and secondly, it is a divine punishment for those who rebel against servitude to Allah in that He makes them slaves to His allies. It is also another opportunity for him to live under the auspices of the Muslims and become acquainted with Islam from within, which may become a reason for him to enter into Islam in the future.

◆ Ransoming prisoners

As for the third option, ransoming the prisoners of the *kuffār*. The majority of jurists have held the opinion that freemen of the age of majority who become prisoners of war may be ransomed by the Imam if he sees this to be for the common good. This because of Allah's words: "Therefore when you meet those who are *kāfir* strike their necks. Then when you have decimated them, tie their bonds tightly and set them free

or ransom them, until the war is finally over.”⁹⁰ As for those prisoners like woman and children the killing of whom is prohibited, ransoming them is not permitted in the Shāfi‘ite and Ḥanbalite schools because they become slaves through capture. The Mālikite school permits the ransoming of women and children. The most well known opinion of the Ḥanafite school is that the ransoming of prisoners is not permitted. Some Ḥanafites have said ransoming is permitted if the Muslims have a need. In this they bring forth the evidence of the prisoners of the battle of Badr.⁹¹

[Issue 60] The spoils belong to the one who slays

From Aḥmad also that he does not have a right in the spoils without that having been stated as a condition [i.e. between him and the Imam].

Mālik said he has the right if it has been stated as a condition, and that it is calculated from a fifth of the *khumus*.

[149] **(Bukhārī and Muslim). Mālik, from Yaḥyā b. Sa‘īd, from ‘Umar b. Kathīr b.**

Aflaḥ, from Abū Muḥammad the Mawlā of Abū Qatādah, from Abū

⁹⁰ *Muḥammad*, 47:4.

⁹¹ *Al-Mawsū‘ah al-fiqhiyyah*, 4:200-201, 32:45; and al-Māwardī, *al-Aḥkām al-sulṭāniyyah*, p.168; and al-Shanqīṭī Muḥammad al-Amīn, *Aḥwāl al-bayān*, 6:417-419; and Sayyid Sābiq, *Fiqh al-sunnah*, 2:686; and The ‘*Tafsīr*’ of al-Qurṭubī, 16:226; and al-Mirdāwī, ‘*al-Inṣāf fī masā’il al-khilāf*’, 4:129.

Qatādah, that the Messenger of Allah said: “One who can prove that he has slain someone has the right of the spoils.”⁹²

- [150] **Aḥmad, from Abū al-Mughīrah, from Ṣafwān b. ‘Amr, from ‘Abd al-Raḥmān b. Jubayr, from his father, that ‘Awf b. Mālik, and Khālīd b. al-Walīd both said: “The Messenger of Allah did not make spoils of war subject to the *khumus* tax.”⁹³**

[Issue 61] Sanctuary granted by a slave is right and proper.

Abū Ḥanīfah said no, unless the slave's master has given him permission to take part in the fighting.

- [151] **Al-A‘mash, from Ibrāhīm al-Taymī, that his father said: “ ‘Alī addressed us and said: ‘Whoever thinks that we have something which we read other than**

⁹² *ṣaḥīḥ*. This is part of a lengthy *ḥadīth* related by al-Bukhārī no.3142 p.253; Muslim in *al-Jihād*; Chapter 'The right of the killer in the booty of the one he kills.' no.1751 p.988; Aḥmad 5:306; Abū Dāwūd 2717 p. 1425; al-Tirmidhī 1562 p. 1812; Ibn Mājah 2837 p. 2648; al-Bayhaqī, *al-Sunan al-kubrā*, 6:220. There are other transmissions for the *ḥadīth*:

(i) Abū Hurayrah in *al-Musnad* of Aḥmad 3:114.

(ii) Anas b. Mālik also in *al-Musnad* of Aḥmad 3:190, 279.

⁹³ *ṣaḥīḥ*. It was related by Aḥmad 6:26; 4:90, 355; Abū Dāwūd 2721 p. 1426. Ibn Ḥajar al-‘Asqqlānī said: “It exists in a lengthy *ḥadīth* related by Muslim.” See Ibn Ḥajar, *al-Talkhīṣ al-ḥabīr*, 3:105; Muslim 1753 p. 988.

the book of Allah, and this document in which there is mentioned camels' ages and some things about the blood money for wounds (*Jirāhāt*), has spoken falsely. In it is says: 'The *dhimmah* of Allah is one and even the lowliest amongst the Muslims can grant their protection.' ”⁹⁴

- [152] Sulaymān b. Bilāl, from Kathīr b. Zayd, from al-Walīd b. Rabāḥ, from Abū Hurayrah, from the Prophet (s.a.s) who said: 'Even the lowliest of my ummah may grant its protection.'⁹⁵ This was related by Aḥmad.

- [153] (Muslim). Abu Ṣāliḥ, from Abū Hurayrah in a *marfūʿ* form: 'The *dhimmah* of the Muslims is one, even the lowliest may grant protection.'⁹⁶

- [154] ʿĀṣim al-Aḥwal related that Fuḍayl b. Zayd said: “A slave granted sanctuary to a group of people and ʿUmar ratified it.”⁹⁷ Saʿīd related this in his *Sunan*.

⁹⁴ *ṣaḥīḥ*. It was related by Aḥmad 1:81; al-Bukhārī, *al-jāmiʿ al-ṣaḥīḥ*, 3172 p. 256; Muslim 1370 p. 905; Ibn Abī Shaybah Abū Bakr ʿAbd Allah b. Muḥammad, *al-Muṣannaf*, 6:514.

⁹⁵ *ḥasan*. It was related by Aḥmad from Abū Hurayrah 2:365; and al-Ḥākim Muḥammad b. ʿAbd Allah, *al-Mustadrak*, 2:141; al-Bayhaqī, *al-Sunan al-kubrā*, 9:94. See also *ḥadīth* 2.

⁹⁶ *ṣaḥīḥ*. It was related by Muslim 1371 p. 905-906; Aḥmad 2:398; Ibn Abī Shaybah Abū Bakr ʿAbd Allah b. Muḥammad, *al-Muṣannaf*, 6:514.

7.2 CAVALRY⁹⁸

[Issue 62] A horseman is entitled to three shares (in the spoils).

Abū Ḥanīfah said: two shares.

[155] **Ibn al-Mubārak, from Fulayḥ b. Muḥammad, from al-Mundhir b. al-Zubayr, that his father said: “The Prophet gave al-Zubayr one share, and his horse two shares.”⁹⁹**

[156] **Muḥammad b. Ḥumrān, n. ‘Abd Allah b. Busr, from Abū Kabshah al-Anmārī who said: “When the Messenger of Allah conquered Mecca, al-Zubayr was on his left flank, and al-Miqdād on his right flank. When the Messenger of Allah entered Mecca, and the people had quietened down, the**

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⁹⁷ *ṣaḥīḥ*. It was related by Sa‘īd b. Manṣūr no. 2609 2:233, from Abū Mu‘āwiyah, from, ‘Āṣim, from Fuḍayl. This isnād is *ṣaḥīḥ* as for all the transmitters are *thiqāt*.

⁹⁸ Sheet 162/A.

⁹⁹ *Munqaṭi‘*. It was related by Aḥmad 3:18 ed. Aḥmad Shākir, al-Nasā’ī 3623 p. 2325. al-Bukhārī mentioned Fulayḥ b. Muḥammad b. al-Mundhir b. al-Zubayr. He stated that his transmission from his

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Messenger of Allah secluded himself with their [i.e. al-Zubayr and al-Miqdād] horses and began to wipe the dust from them and said: 'I have set the entitlement of a horse at two shares and for a rider one share. Whoever gives them less may Allah give him less.'¹⁰⁰

I [i.e. al-Dhahabī] say: 'Abd Allah b. Busr is al-Ḥubrānī. He is considered to be *ḍa'if* and al-Nasā'ī said: he is not *thiqah*.

[157] Qays b. al-Rabī', from Muḥammad b. 'Alī, from Abū Ḥāzim, that Abū Ruḥm said: "I and my brother took part in a military raid with the Messenger of Allah (s.a.s) and we had two horses with us. He gave us six shares."¹⁰¹

This was related by al-Dāraquṭnī.

I [i.e.al-Dhahabī] say: Qays is *ḍa'if*.

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father is *mursal* [i.e. disconnected.] *al-Tārīkh al-kabīr*, 7:133 no. 603. See also Ibn Ḥajar, *Ta'jīl al-manfa'ah bi rijāl al-'a'immah al-arba'ah*, 1:335; al-Zayla'ī, *Naṣb al-rāyāh*, 3:415.

¹⁰⁰ *ḍa'if*. It was related by al-Dāraquṭnī 4:101; al-Ṭabarānī, *al-Mu'jam al-Kabīr*, 22:342; al-Bayhaqī, *al-Sunan al-kubrā*, 6:327; In the *isnād* there is 'Abd Allah b. Busr al-Ḥubrānī. He was considered *ḍa'if* by Ibn Ḥajar al-'Asqalānī, *Taqrīb al-Tahdhīb*, p. 494.

¹⁰¹ *ḍa'if*. It was related by al-Dāraquṭnī 4:101. He has another *isnād* for it which is from Ibn 'Ayyāsh, from 'Ishāq b. Abī Farwah, from Abī Ḥāzim, from from Abū Ruḥm. It was also related by al-

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- [158] **Abū Usāmah, from ‘Ubayd Allah, from Nāfi‘, that Ibn ‘Umar said: “The Messenger of Allah gave a horse two shares and its owner one share.”¹⁰²**

The others argue using:

- [159] **Aḥmad, from Ishāq b. ‘Īsā, from Muḥammī‘ b. Ya‘qūb, from his father, from his uncle ‘Abd al-Raḥmān b. Yazīd, that his uncle Muḥammī‘ b. Jāriya said: “The Messenger of Allah apportioned [the spoils] at Khaybar and gave horsemen two shares and the foot-soldiers one share.”¹⁰³**

Abū Dawūd says: this contains error (*wahm*).

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Ṭabarānī, *al-Mu‘jam al-Kabīr*, 19:186; Abū Ya‘lā, *al-Musnad*, 12:297; al-Bayhaqī, *al-Sunan al-kubrā*, 6:326. Ibn Abī Farwah is very weak. See also, al-Zayla‘ī, *Naṣb al-rāyah*, 3:414.

¹⁰² *ṣaḥīḥ*. It was related by al-Dāraquṭnī 4:102; Aḥmad 2:41; al-Bukhārī, *al-jāmi‘ al-ṣaḥīḥ*, 2863 p. 230; Muslim 1762 p. 990; Abū Dāwūd 2733 p. 1426; al-Tirmidhī 1554 p. 1811; Ibn Mājah 2854 p. 2649; Sa‘īd b. Manṣūr 2:278 no. 2762.

¹⁰³ *ḍa‘īf*. It was related lengthily by Aḥmad 3:420; Abū Dāwūd 2736, 3015 p. 1427, 1450; al-Dāraquṭnī 4:105-106; Ibn Abī Shaybah Abū Bakr ‘Abd Allah b. Muḥammad, *al-Muṣannaḥ*, 6:493. Abū Dāwūd said: “The *ḥadīth* of Abū Mu‘āwiyah [i.e. one of transmitters in *ḥadīth* 155] is more correct and is acted upon. I consider an error in *Muḥammī*’s version as for his mention ‘300 cavaliers’ while they were 200 only.” Ibn ‘Abd al-Barr is of the same opinion in his *al-Tamhīd*, 24:237. See also al-Zayla‘ī, *Naṣb al-rāyah*, 3:416.

- [160] Ibn Numayr, from 'Ubayd Allah, from Nāfi', that Ibn 'Umar said: "The Messenger of Allah gave to horsemen two shares and to foot-soldiers one share."¹⁰⁴

This was related by Abū Bakr al-Naysābūrī, from al-Ramādī, from Abū Bakr b. Abī Shaybah, from Ibn Numayr.

He [i.e. Abū Bakr al-Naysābūrī] said: This is the *wahm* of Ibn Abī Shaybah, or al-Ramādī, because Aḥmad b. Ḥanbal, 'Abd al-Raḥmān b. Bishr, and others relate this *ḥadīth* from Ibn Numayr in a form other than this.

He said: This is also related by Nu'aym b. Ḥammād, from Ibn al-Mubārak, from 'Ubayd Allah in the same way as it is by Ibn Abī Shaybah, so perhaps the *wahm* is from Nu'aym.¹⁰⁵

[Issue 63] A share is given to [a man who has] two horses

The majority say that he is not given a share for more than one horse.

¹⁰⁴ *ḍa'īf*. It was related by Aḥmad 2:2; al-Dāraquṭnī 4:106. This version contradicts the sound mentioned-above transmission from Ibn 'Umar. See *ḥadīth* 155; and Ibn al-Jawzī, *al-Taḥqīq*, 2:245.

[161] Sa'īd b. Manṣūr relates, from Ibn 'Ayyāsh, that al-Awzā'ī said: 'The Messenger of Allah would give a share for cavalry, but would not give a man shares for more than two horses, even if he had ten horses with him'¹⁰⁶.”¹⁰⁷

[162] Sa'īd relates, from Faraj b. Faḍālah, from al-Zubaydī, that al-Zuhrī said: “‘Umar wrote to Abū ‘Ubaydah: I will give two shares for a single horse, and four shares for two horses, and for their owner one share, which makes five shares. Any more than two horses will be disregarded.”¹⁰⁸

[Issue 64] In captivity, families are not to be split up

The majority say that it is allowed, despite the differences of opinion regarding selling them, as has been mentioned.¹⁰⁹

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¹⁰⁵ This was quoted by al-Dāraquṭnī in his *Sunan*; 4:106.

¹⁰⁶ Sheet 162/B.

¹⁰⁷ *mu'ḍal*. This is related by Sa'īd b. Manṣūr 2: 281 no. 2774 and al-Dāraquṭnī 4:106. It is disconnected between al-Awzā'ī and the Prophet.

¹⁰⁸ *ḍa'if*. This is related by Sa'īd b. Manṣūr 2: 281 no. 2775. It is disconnected between al-Zuhrī and 'Umar.

¹⁰⁹ see Ibn al-Jawzī, *al-Taḥqīq*, 2:191-193.

- [163] The *ḥadīth* of Abū Mūsā: “May Allah curse anyone who separates a mother from her child.”¹¹⁰

[Issue 65] If one or both parents of a child are not known, the child is considered to be a Muslim.

This is in opposition to the majority.

- [164] (Bukhārī and Muslim): Hammām, from Abū Hurayrah, that the Messenger of Allah said: “No child is born other than on the *fiṭrah*, and it is his parents who make him a Jew or a Christian.”¹¹¹

¹¹⁰ *ṣaḥīḥ*. It was related by al-Dāraquṭnī, 3:67. There are other transmissions for this *ḥadīth*:

(i) From Abū Ayyūb that the Prophet said: “If anyone separate a mother from her child, Allah would separate him from his dears on the Day of Rising.” This was related by Aḥmad 5:413,414; al-Tirmidhī 1566 p. 1813; al-Ḥākim Muḥammad b. ‘Abd Allah, *al-Mustadrak*, 2:55. al-Tirmidhī said: “This *ḥadīth* is *ḥasan and gharīb*. The people of knowledge amongst the Companions of the Prophet and others acted upon it. They disliked to separate between captives i.e. a mother and her child, or a child and his father, or between brothers.”

(ii) From ‘Imrān b. Ḥuṣayn that the Prophet said: “If anyone separate [i.e. a mother from her child] is cursed.” It was related by al-Ḥākim Muḥammad b. ‘Abd Allah, *al-Mustadrak*, 2:55, who said that it is *ṣaḥīḥ*.

See also, al-Dāraquṭnī, *al-‘Ilal*, 3:272; and 7:217 Ibn al-Kharrāṭ ‘Abd al-Ḥaqq al-Ashbīlī, *al-Aḥkām al-wuṣṭā*, 3:262-263.

¹¹¹ *ṣaḥīḥ*. It was related by Aḥmad 2:253, 315, 346; al-Bukhārī in *al-Janā‘iz*; Chapter ‘If the child becomes a Muslim then dies’ no.1359 p.106; Muslim in *al-Qadar*; Chapter ‘The meaning of every newborn is born upon the *fiṭrah*’ no.2658 p.1141; al-Tirmidhī 2138 p. 1866.

[Issue 66] If a person takes booty before it has been apportioned, his saddlebags should be burnt except for weapons, copies of the Qur'an, and animals.

The majority say that this is not permitted.

[165] Al-Darāwardī, from Ṣāliḥ b. Muḥammad b. Zā'idah, from Sālim b. 'Abd Allah that he was with Maslamah in the territory of the Byzantines and he found some illicit spoils (*ghulūl*) in the belongings of a man. He asked Sālim, and Sālim said: 'Abd Allah related to me, from 'Umar, that the Messenger of Allah said: "If you find some illicit spoils in the belongings of someone then burn them." He [i.e. the narrator] said: 'I think he said: "And beat the man." He (the narrator) said: His belongings were taken to the market and amongst them was found a copy of the Qur'ān, so he [i.e. Maslamah] asked Sālim and he said: 'Sell it and give away the proceeds as charity.' " ¹¹²

Ṣāliḥ was considered *ḍa'īf* by Yaḥyā and al-Dāraquṭnī, and he (i.e. al-Dāraquṭnī) said: "No one followed him in this narration, and it has no chain of authority."

¹¹² *ḍa'īf*. It was related by Aḥmad 1:218; no.144. Ed. Aḥmad shākir; Abū Dāwūd 2713 p. 1425; al-Tirmidhī 1461 p. 1801; al-Ḥākim Muḥammad b. 'Abd Allah, *al-Mustadrak*, 2:127. Al-Bukhārī said: Ṣāliḥ is *munkar al-ḥadīth* (very weak). Al-Dhahabī contradicted himself when he weakened Ṣāliḥ in his *al-Kashif*, and *al-Mīzān*, while in his commentary on *al-Mustadrak* authenticated his transmission. See also, Ibn 'Adī, *al-Kāmil fī ḍu'afā' al-rijāl*, 4:58.

Aḥmad said that he did not see any fault in Ṣāliḥ.

[Issue 67] Gifts to officials are treated as the rest of the wealth of the group, and they do not have a specific right over them

It is also related from Aḥmad that they do have specific right over them, as was the opinion of Abū Ḥanīfah.

[166] (Bukhārī and Muslim): Al-Zuhrī, from ‘Urwah, that Abū Ḥumayd al-Sā‘idī said: “The Messenger of Allah employed a man named Ibn al-Lutbiyyah to collect the *ṣaḍaqaḥ* (charity). The man came later and said: 'This is for you, and this was gifted to me.'¹¹³ Had he not sat in the house of his parents to see if they would give to him or not! By Allah, Not one of you will bring something of this kind but will come on the day of resurrection with it round his neck.'¹¹⁴

¹¹³ Missing from this is: “The Messenger of Allah stood up at the pulpit and said: 'What is with the employee who we send on an errand and who comes and says this is for you and this was gifted to me. . .'” This is the wording of Aḥmad in *al-Musnad*, 5:423.

¹¹⁴ *ṣaḥīḥ*. It was related by Aḥmad 5:423; and al-Bukhārī in *al-Aḥkām*; Chapter 'The gifts of employees.' no.7174 p. 598; Muslim in *al-Imārah*; Chapter 'Forbidding the gifts of employees.' no.1832 p.1007; Abū Dāwūd 2946 p.1443.

- [167] Aḥmad, from Ishāq b. 'Isā, from Ismā'il b. 'Ayyāsh, from Yaḥyā b. Sa'id, from 'Urwah, from Abū Ḥumayd al-Sā'idī that the Messenger of Allah¹¹⁵ said: "Gifts to officials are illicit spoils (*ghulūl*)."¹¹⁶

- [168] It is also related from Ibn 'Abbās in a *marfū'* form: "Gifts to officials are illicit spoils (*ghulūl*)."

7.3 TERRITORIES

[Issue 68] Mecca was conquered by force of arms

Also from Aḥmad: through a peace treaty, as is the opinion of al-Shāfi'ī.

Our evidence:

¹¹⁵ Sheet, 163/A.

¹¹⁶ *ṣaḥīḥ*. It was related by Aḥmad 5:424; al-Bayhaqī, *al-Sunan al-kubrā*, 10:138; Ibn 'Adī, *al-Kāmil*, 1:295 all from Abī Ḥumaid. There are other transmissions from other Companions:

(i) From Jābir b. Abd Allah that the Prophet said: "Gifts to officials are illicit spoils (*ghulūl*)."

It was related by al-Ṭabarānī, *al-Mu'jam al-Awṣaṭ*, 5:509 no. 4966. See also, Ibn 'Abd al-Barr, *al-Tamhīd*, 2:10.

(ii) From Abū Hurayrah. It was related by al-Ṭabarānī Sulaymān b. Aḥmad, *al-Mu'jam al-Awṣaṭ*, 8:415 no. 7848.

(iii) From Ibn 'Abbās. It was related by al-Ṭabarānī Sulaymān b. Aḥmad, *al-Mu'jam al-Awṣaṭ*, 7:458 "Gifts to the Imam [i.e. President] are illicit spoils (*ghulūl*)."

Ibn Ḥajar weakened all the transmissions in his *al-Talkhīṣ al-ḥabīr*, 4:189-190. See also, al-Albānī, *'Irwā' al-ghalīl fī takhrīg aḥādīth Manār al-sabīl*, 8:246.

[169] (Bukhārī and Muslim). al-Layth, from al-Maqburī, from Abū Shurayḥ, that the Prophet said the day after the conquest of Mecca: "Mecca has been sanctified by Allah, and not by the people. It is not permitted for one who has faith in Allah and the last day to spill blood within her boundaries, nor to fell a tree, and if anyone takes it upon himself (to fight) because of the fighting of the Messenger of Allah, then say: Allah has given permission to His Messenger, and has not given permission to you. Indeed He gave permission to me for a time during a day, and the sanctity of Mecca today has returned to what it was yesterday. So let those present inform those absent."¹¹⁷

[170] (Bukhārī and Muslim): Al-Awzā'ī, from Yaḥyā, from Abū Salamah, from Abū Hurayrah, that the Prophet said: "Allah kept the elephant away from Mecca, and gave the Messenger of Allah and the believers dominion over it. Indeed, (killing) is not permitted to anyone henceforth, and I was only permitted for a time on one day."¹¹⁸

¹¹⁷ *ṣaḥīḥ*. It was related by Aḥmad 6:385; 4:32; al-Bukhārī in *Jazā' al-Ṣayd*; Chapter 'The trees of a sanctuary are not to be cut' no.1832 p.143; Muslim in *al-Ḥajj*; Chapter 'The sanctification of Mecca' no.1354 p.903; al-Tirmidhī 1406 p. 1794; al-Nasā'ī 2879 p. 2273; al-Dāraquṭnī 3:95-96.

¹¹⁸ *ṣaḥīḥ*. It was related by al-al-Bukhārī, *al-jāmi' al-ṣaḥīḥ*, in *al-Luqaṭah*; Chapter 'How the finds of the people of Mecca are recognised' no.2434 p.191; Muslim in *al-Ḥajj*; Chapter 'The sanctification of Mecca' no.1355 p.904; Abū Dāwūd 2017 p. 1371; Aḥmad 2:238; al-Dāraquṭnī 3:97-98.

- [171] (Muslim): Sulaymān b. al-Mughīrah, from Thābit, from ‘Abd Allah b. Rabāḥ, that Abū Hurayrah mentioned the conquest of Mecca and said: “The Prophet approached and entered Mecca, and sent al-Zubayr on one flank, Khālīd on the other flank, and Abū ‘Ubaydah on those not heavily armed. They took the lower reaches of the valley, while the Messenger of Allah was with his detachment of troops. The Quraysh had already gathered their mobs and had said: 'We will send them forward and if they gain anything we will be with them, and if they are struck down we will give whatever is asked of us.' Abū Hurayrah said: 'He [i.e. the Prophet] noticed this and said to me: 'O Abū Hurayrah'. I said: 'At your service O Messenger of Allah. 'He said: 'Call the *Anṣār* for me, and let none come but the *Anṣār*.' So I called for them and they came and surrounded him. He said: 'Do you see the mobs of the Quraysh and their followers?' Then he said with one hand upon the other: Mow them down thoroughly until we join up at al-Ṣafā' Abū Hurayrah said: 'So we charged¹¹⁹ and killed those that we wished of them. Then Abū Sufyān said: 'The best of the Quraysh have been exposed to being killed, and after today there will be no Quraysh.' Then the Messenger of Allah said: 'He who locks his door will be safe. He who enters the house of

Abū Sufyān will be safe.' So the people locked their doors. Then the Messenger of Allah approached the Stone [i.e. the Black Stone of the Ka'bah] and touched it, then circumambulated the House and in his hand was a bow which he was holding by its curved part. During his circumambulation, he came across an idol at the side of the house, which they [i.e. the polytheists] worshipped. He began stabbing it in its eyes and saying: 'Truth has come and falsehood has perished.' Then he went to al-Ṣafā and scaled it from where he could look at the House. He raised his hands to the sky and began to invoke the name of Allah as much as he wished and supplicate to Him."¹²⁰

- [172] Muḥammad b. al-Ḥasan b. Zabālah, from Mālik, from Hishām, from his father, from 'Ā'ishah that The Messenger of Allah said: "Other cities were conquered by the sword, but Madīnah was conquered by the Qur'ān."¹²¹

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¹¹⁹ Sheet; 163/B.

¹²⁰ *ṣaḥīḥ*. It was related by Aḥmad 2:538; Muslim in *al-Jihād*; no.1780 p.995; Ibn Abī Shaybah Abū Bakr 'Abd Allah b. Muḥammad, *al-Muṣannaf*, 7:397; al-Bayhaqī, *al-Sunan al-kubrā*, 9:117; Ibn Ḥibbān, 11:73-76 no. 4760.

¹²¹ *ḍa'īf jiddan* (very weak.) It was related by Ibn 'Adī, *al-Kāmil*, 6: 2810 from Ibn Zabālah Muḥammad b. al-ḥasan who was accused by many *ḥadīth* jurists as a liar. See also Ibn al-Jawzī, *al-Mawḍū'āt*, 2:127.

Aḥmad said: This *ḥadīth* is *munkar*, and is one of the sayings of Mālik. I have seen this Shaykh - meaning Ibn Zabālah - and he was a liar (*kadhḥāb*).

[Issue 69] The selling of areas of Mecca is allowed.

This is also the opinion of al-Shāfi'ī.

Also from Aḥmad: It is not allowed.

This is based upon the difference between lands conquered by treaty and those conquered by force. If we say the land was conquered by force, it becomes part of the endowments (*awqāf*) of the Muslims. If we say it was conquered through a treaty, then it remains in the hands of its populace.

[Issue 70] If a land is conquered by force, then the Imam has the choice of either apportioning it amongst those who have seized it or endowing it to the Muslims.

From Aḥmad also: Apportioning it is mandatory, as Mālik said.

Abū Ḥanīfah said: He has the choice between apportioning it, or letting it remain with the populace with them paying the *kharāj* (land tax), or moving them out and bringing another people who will pay the *kharāj*. He [i.e. the Imam] does not have the option of making it an endowment.

- [173] (Abū Dāwūd): Asad b. Mūsā, from Yaḥyā b. Zakariyyā, from Sufyān, from Yaḥyā b. Sa'īd, from Bashīr b. Yasār, that Sahl b. Abī Ḥathmah said: "The Messenger of Allah apportioned Khaybar into two halves: half for contingencies and for his needs, and half amongst the Muslims which he split into eighteen shares."¹²²

[Issue 71] It is permissible to make *nafl* (supererogatory payments) from four-fifths of the booty.

Mālik and al-Shāfi'ī said: It should be from a fifth of the fifth that is for the commonweal.

- [174] (Bukhārī and Muslim): Ayyūb, from Nāfi', that Ibn 'Umar said: "The Messenger of Allah sent a raiding party to Najd. The booty for each person numbered 12 camels, and the Messenger of Allah paid out a bonus (*nafl*) of one camel to each person."¹²³

¹²² *ṣaḥīḥ*. It was related by Abū Dāwūd In *al-Kharrāj*; Chapter 'Regarding the land of Khaybar' no.3010 p.1449-1450; al-Ṭabarānī, *al-Mu'jam al-Kabīr*, 6:102; al-Bayhaqī, *al-Sunan al-kubrā*, 6:317. Ibn Ḥajar authenticated the *ḥadīth* in his *Fatḥ al-Bārī*, 6:203.

¹²³ *ṣaḥīḥ*. It was related by Aḥmad 2:10, 151; 2:55; and from 'Ubayd Allah, from Nafi'; and 2:62, 112 from Mālik, from Nāfi'; al-Bukhārī in *al-Jāmi' al-Ṣaḥīḥ*, *al-Maghāzī*; Chapter 'The raiding party that went to Najd' no.4338 p.355; Muslim in *al-Jihād*; Chapter 'Public estates' no.1749 p.987; Abū Dāwūd 2744 p. 1427; al-Ṭabarānī Sulaymān b. Aḥmad, *al-Mu'jam al-Kabīr*, 12:385 no. 13426;

[175] Al-‘Alā’ b. al-Ḥārith, from¹²⁴ Makḥūl, from Ziyād b. Jāriyah, that Ḥabīb b.

Maslamah said: “The Messenger of Allah distributed as *nafl* one-fourth after the *khumus* at the outset, and one-third after the *khumus* on his return.”¹²⁵

[Issue 72] The wealth of the troops surplus to the commonweal belongs to all of the Muslim community, the poor and the rich.

Al-Ṣhāfi‘ī said: It is specifically for the commonweal.

[176] Al-Zuhrī, from Mālik b. Aws b. al-Ḥadathān, that ‘Umar said: “Allah conferred upon His Prophet that which He did not grant to others when He said: ‘Whatever booty from them Allah has given to His Messenger and you spurred on neither horse nor camel in its acquisition, [but Allah gives power

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al-Bayhaqī, *al-Sunan al-kubrā*, 6:312-313; Ibn Ḥibbān, 11:164 no. 4833; Sa‘īd b. Manṣūr, 2:262 no. 2704.

¹²⁴ *Sheet*; 164/A.

¹²⁵ *ṣaḥīḥ*. It was related by Aḥmad 4:160; Abū Dāwūd 2749 p. 1428; Ibn Mājah 2851 p. 2649; ‘Abd al-Razzāq al-Ṣan‘ānī, *al-Muṣannaf*, 5:189; Sa‘īd b. Manṣūr 2:262 no. 2702; Ibn Ḥibbān, 11:165 no. 4835; al-Ḥākim Muḥammad b. ‘Abd Allah, *al-Mustadrak*, 2:133; al-Bayhaqī, *al-Sunan al-kubrā*, 6:313. Both al-Ḥākim and al-Dhahabī considered the *ḥadīth* as *ṣaḥīḥ*.

to His Messengers over any one He wills, Allah has power over all things]¹²⁶

So this was for the Messenger of Allah only but he did not prefer it for himself over you, nor did he possess it rather than you but he used to expend it on his family for a year and make the remainder as the wealth of Allah, exalted is he.”¹²⁷

The point of the evidence here is that the Qur’anic verses encompass all people.

7.4 JIZYAH

[Issue 73] The Magians do not have a holy book.

This is in opposition to one of the two opinions of al-Shāfi‘ī.

[177] (Abū Dāwūd): Muḥammad b. Bilāl, from ‘Imrān al-Qaṭṭān, from Abū Jamrah, that Ibn ‘Abbās said: “When the people of Persia's prophet died, Iblīs wrote Magianism for them.”¹²⁸

¹²⁶ *al-Ḥaṣhr* 59: 7.

¹²⁷ *ṣaḥīḥ*. It was related by Aḥmad 1:25, 47, 48, 49; al-Bukhārī, *al-jāmi‘ al-ṣaḥīḥ*, 2904 p. 233; Muslim 1757 p. 989; Abū Dāwūd 2963 p. 1444; al-Tirmidhī 1719 p. 1827; al-Nasā’ī 4145 p. 2358; al-Bayhaqī, *al-Sunan al-kubrā*, 6: 296.

¹²⁸ *ḥasan*. It was related by Abū Dawūd, Chapter 'Regarding the taking of the Jizyah from the Magians' no.3042 p.1452. This relation is in a *mawqūf* form. In fact, such a profound historical

- [178] Al-Shāfi'ī, from Sufyān, from Sa'īd b. al-Marzubān, that Naṣr b. 'Āṣim said: "Farwah b. Nawfal said: 'On what basis is the *jizyah* taken from the Magians when they are not a people of the Book?' Al-Mustawrid stood up to him and took him by the neck and said: 'O enemy of Allah, do you question Abū Bakr, 'Umar and 'Alī who all took the *jizyah* from them?' Then he took him to the palace, and 'Alī came out to them and said: 'Wait, I am the most knowledgeable about the Magians. They have divine knowledge, which they teach, and a holy book, which they study. Their king once became drunk, and fell upon his daughter or his mother but was seen by one of his subjects. When the king became sober they came to carry out the *ḥadd* but he stopped them and called upon his subjects and said: 'Do you know a religion better than that of 'Ādam? He used to marry off his sons to his daughters. I am of the religion of 'Ādam, so what is it that takes you away from his religion?' The people followed him, and fought all those who opposed him until they had killed them. So they found, after having been going according their book, that the knowledge that their breasts held vanished, while they were a

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information can not be known by mere intellect. He either heard from the Prophet or the people of the book.

people of the Book. The Messenger of Allah (s.a.s), Abū Bakr, and 'Umar all took the *jizyah* from them."¹²⁹

Sa'īd has been considered to be *ḍa'īf*.

- [179] Mālik, from Ja'far b. Muḥammad, that his father said: " 'Umar b. al-Khaṭṭāb mentioned the Magians and said: 'I do not know what to do regarding them.' So 'Abd al-Raḥmān b. 'Awf said to him: 'I testify that I heard the Messenger of Allah say: 'Treat them as you treat the people of the Book.'"¹³⁰
- [180] Ibn 'Uyaynah, from 'Amr, who heard Bajālah saying: " 'Umar did not accept the *jizyah* from the Magians until Ibn 'Awf testified that the Messenger of Allah had taken it from the Magians of Hajar."¹³¹

¹²⁹ *ḍa'īf*. It was related by al-Shāfi'ī, *Badā'ī' al-minan fī tartīb musnad al-Shāfi'ī wa al-sunan*:2:35; no.1185, al-Bayhaqī, *al-Sunan al-kubrā* 9:188-189; 'Abd al-Razzāq al-Ṣan'ānī, *al-Muṣannaḥ*, no. 10029 6:70; Abu Ya'lā, *al-Musnad*, no. 301 1:256-257. In the chain Sa'īd b. al-Marzubān who was accused by many scholars i.e. al-Bukhārī, Ibn Ma'in and al-Fallās as *ḍa'īf*. Abū Zur'ah said he was *ṣadūq* and *mudallis*. The relation was rejected by Ibn al-Jawzī, al-Dhahabī and al-Haythamī in his *Majma' al-Zawā'id*, 6:5. However, Ibn Ḥajar considered it as *ḥasan* in his *Fatḥ al-Bārī*, 6:261. See also, Ibn 'Abd al-Barr, *al-Tamhīd*, 2:119; and al-Dhahabī, *Mẓān al-'itidāl*, 2:347-348.

¹³⁰ *munqati'*. It was related by Mālik no. 43 p. 107 Bewley; Ibn Abī Shaybah Abū Bakr 'Abd Allah b. Muḥammad, *al-Muṣannaḥ*, 6:433 no. 32641; 'Abd al-Razzāq al-Ṣan'ānī, *al-Muṣannaḥ*, 10:325 no. 19253. Ibn 'Abd al-Barr said: "This *ḥadīth* is *munqati'* (disconnected) as for Muḥammad b. 'Alī did not meet 'Umar." *al-Tamhīd*, 2:114; See also al-Zayla'ī, *Naṣb al-rāyāh*, 3:448.

¹³¹ *ṣaḥīḥ*. It was related by Aḥmad 1:194; al-Bukhārī, *al-jāmi' al-ṣaḥīḥ*, 3156, 3157 p. 255; Abū Dāwūd 3043 p. 1452; al-Tirmidhī 1586, 1587 p. 1815; al-Bayhaqī, *al-Sunan al-kubrā*, 8:247-248. See also, Ibn 'Abd al-Barr, *al-Tamhīd*, 2:125.

The people of knowledge have differed in this issue. The majority, Abū Ḥanīfah, Mālik, and Aḥmad held the opinion that the Magians are not among the 'People of the Book'. Al-Shāfi'ī held the opinion that they are among the 'People of the Book'. If they are not among the 'People of the Book', then it is permissible to take the *jizyah* tax from every non-believer, by analogy with the Magians. This is the opinion of Abū Ḥanīfah and Mālik, and is in one of two reports from Aḥmad. If they are among the 'People of the Book', then the *jizyah* tax is only to be taken from the 'People of the Book', who are the Jews, the Christians, and the Magians. This is the opinion of al-Shāfi'ī and of another report from Aḥmad. As for all other non-believers, only their acceptance of Islam will be accepted from them or death. Abū Ḥanīfah excepted from this idol-worshippers amongst the Arabs and only accepted from them their entry into Islam or death. The opinion that it is permissible to accept the *jizyah* tax from an unbeliever as long as he is not an apostate from Islam is more correct on the basis of evidence, as will become clear from the following study and the discussion of the evidence of each group.

Those who hold that the *jizyah* tax should be taken from the 'People of the Book' and not other unbelievers argue using a report from 'Alī b. Abī Ṭālib who, when he

was asked about the Magians, said that they were of the 'People of the Book'.¹³² They say that the divine books were not only the Torah and the Evangel but that Allah had sent down other books; for example the book of Abraham, referred to in the Qur'ān as the *Ṣuḥuf* of Abraham,¹³³ and the book of David, the '*Zabūr*' or Psalms. The commandment to fight the Polytheists is to be found in the Qur'ān: "Fight the *mushrikūn* totally just as they fight you totally."¹³⁴ i.e. until they enter into Islam, and the 'People of the Book' have been singled out for paying the *jizyah* tax. There exists in the *sunnah* that the Magians are part of the 'People of the Book', while other unbelievers remain under the general commandment to be fought until they accept Islam, and it is not proven that the Prophet accepted the *jizyah* tax from them, which shows that the *jizyah* is specific to the people of the three religions; the Jews, the Christians and the Magians, whether they be Arabs or non-Arabs, the criterion being religion and not lineage.¹³⁵ They also argue using the report that 'Umar b. al-Khaṭṭāb suspended judgement above them until 'Abd al-Raḥmān b. 'Awf testified to him that the Prophet had accepted the *jizyah* from the Magians of

¹³² See *ḥadīth* no.174.

¹³³ See the Qur'ān, *Sūrah* al-A'lā, 87:18-19.

¹³⁴ *Al-Tawbah*, 9:36.

¹³⁵ See al-Shāfi'ī, *al-Umm*, 4:255.

Hajar.”¹³⁶ They said that were the *jizyah* to be taken from every unbeliever, then ‘Umar would not have suspended judgement regarding the Magians.

The majority of jurists reply to the *ḥadīth* of ‘Alī saying that it is not authentic.¹³⁷ As for the *ḥadīth*, “Treat them as you treat the People of the Book”,¹³⁸ this is an indication that they are not actually ‘People of the Book’ but are to be treated in the same way as the ‘People of the Book’ in that the *jizyah* tax is to be taken from them. It is not proven that they are ‘People of the Book’ nor that they have a Book. If they had been ‘People of the Book’, then ‘Umar would not have suspended judgement about them until one of the Prophetic Companions mentioned to him the *ḥadīth* “Treat them as you treat the ‘People of the Book’ ”. There is no difference between them and other idol worshippers. The majority of jurists sought to prove that it is permissible to take the *jizyah* tax from the rest of the unbelievers by the *ḥadīth* of Buraydah who said: “when the Messenger of Allah gave orders to the leader of an army or troop, he would enjoin upon him God-fearing piety and he would enjoin the good upon those Muslims who were with him. Then he would say, ‘Attack in the

¹³⁶ It was related by al-Bukhārī, no.3157, section on *Jizyah*; and al-Tirmidhī no.1586; and Abū Dawūd no.3043. al-Tirmidhī said: It is *ḥasan* and *ṣaḥīḥ*’.

¹³⁷ See the commentary on *ḥadīth* no.174.

¹³⁸ This was related by Mālik, *al-Muwattaʿa*, section on ‘*Zakāʾ*’, no.617. ‘From Jaʿfar b. Muḥammad b. ‘Alī, from his father that ‘Umar b. al-Khaṭṭāb mentioned the Zoroastrians saying: ‘I do not know how to treat them’ ‘Abd al-Rahmān b. ‘Awf said: ‘I testify that I heard the Prophet saying: ‘Treat them as you treat the People of the Book.’

Name of Allah and in the way of Allah and fight those who disbelieve in Allah. Do not take booty, do not betray, do not mutilate, and do not kill children. When you meet your enemy from amongst the Polytheists then invite them to three things and whichever they take then accept it from them and stay your hands from them . . .',¹³⁹

The three things mentioned are Islam, the *jizyah*, or being fought. This is in general terms in which no specific group of the Polytheists are mentioned. The Qur'ānic verse points to the legality of taking the *jizyah* from the 'People of the Book' but it does not give them the monopoly in this law. Hence, the *jizyah* is taken from the 'People of the Book' based on the Qur'ān and from the rest of the unbelievers based on the authentic *sunnah*. The majority of jurists reply to the fact that the Prophet did not take the *jizyah* from the idol worshippers because the *jizyah* came into force in the year of the battle of Tabūk in the ninth year of the Hijrah (=930), one year before the death of the Prophet.¹⁴⁰ The entire Arabian peninsula had entered Islam so the Prophet did not take the *jizyah* from the Jews of Madīnah because of the peace treaty between him and the Jews made in the first year of the Hijrah and the *jizyah* had not yet been instigated.¹⁴¹

¹³⁹ This was related by Muslim, section on *jihād*, no.1731; and Abū Dawūd, section on *jihād*, no.2613; and Ibn Mājah section on *jihād*, no.2858, all related it from Buraydah b. al-Ḥuṣayb.

¹⁴⁰ See the '*Tafsīr*' of Ibn Jarīr al-Ṭabarī, 14:200.

[Issue 74] If a *ḥarbī* passes through in trade, one-tenth is taken from him. If he is a *dhimmī*, one-twentieth is taken.

Abū Ḥanīfah said: Nothing is taken from him unless they take from us.

Mālik said: It is taken from them when they sell their wares.

Al-Shāfi'ī said: If this is a condition upon them then taking it is permissible.

[181] Aḥmad, from Jarīr, from 'Aṭā' b. al-Sā'ib, from Ḥarb b. Hilāl, that Abū Umayyah, a man from the tribe of Taghlib, heard the Messenger of Allah saying: "Tithes are not paid by the Muslims. Tithes are paid by the Jews and Christians."¹⁴²

[182] 'Abd al-Salām b. Ḥarb, from 'Aṭā', from Ḥarb b. 'Ubayd Allah al-Thaqafī, that his grandfather, who was a man from the tribe of Taghlib, said: "I went to the Prophet and became a Muslim, and he taught me Islam, and how I should collect the *zakāt* from my people. I said: 'O Messenger of Allah,

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¹⁴¹ See Ibn Kathīr, *al-Bidayāh wa al-Nihāyah*, 4:554-558.

¹⁴² *ḍa'īf*. It was related by Aḥmad 5:410; Abū Dāwūd 3046 p. 1452; Ibn Abī Shaybah Abū Bakr 'Abd Allah b. Muḥammad, *al-Muṣannaf*, 2:416 no. 10574; Ibn Sa'd, *al-Ṭabaqāt*, 6:59; al-Bayhaqī, *al-Sunan al-kubrā*, 9:211. He mentioned Abū Ḥamdah instead of Abū 'Umayyah. al-Bukhārī weakened

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should I collect tithes from them?' He said: 'No, tithes are upon the Christians and Jews.'¹⁴³

[Issue 75] If a *dhimmī* blasphemes against Allah, His Prophet, or His Books, his covenant is invalidated.

Abu Ḥanīfah said: This does not invalidate it.

[183] (Abū Dāwūd): Ismā'īl b. Ja'far, from Isrā'īl, from 'Uthmān al-Shahhām, from 'Ikrimah, that Ibn 'Abbās said: "A blind man lived at the time of the Messenger of Allah and had a concubine¹⁴⁴ who used to curse the Messenger of Allah. He would rebuke her [but she would not be rebuked]¹⁴⁵ and he would exhort her not to but she would not cease. One night when she started slandering the Prophet, he took up a pick, put it in her belly, leant on it, and killed her. This was mentioned to the Prophet who gathered the people and

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it due to the *iḍṭirāb* (link disorder). *Al-Tārīkh al-kabīr*, 3:60. See also, al-Tirmidhī, *al-'Ilal*, p. 103; al-Haythamī, *Majma' al-zawā'id*, 2:259.

¹⁴³ *ḍa'if*. It was related by Abū Dāwūd 3049 p. 1452; Aḥmad 5:410; al-Bayhaqī, *al-Sunan al-kubrā*, 9:199. This is another transmission for the previous *ḥadīth* 177.

¹⁴⁴ A slave woman who begets a child for her master.

exhorted them. Then the blind man approached trembling and said, I am the concerned, she was cursing you and slandering you ...(to the end of the story). So the Prophet said: 'Bear witness that her blood is without recompense (*hadar*).' ”¹⁴⁶

- [184] (al-Nasā'ī): Shu'bah, from Tawbah al-'Anbarī, from 'Abd Allah b. Qudāmah, that Abū Barzah said: "A man spoke rudely to Abū Bakr al-Ṣiddīq so I said: 'Shall I kill him?' But Abū Bakr chided me and said: 'This is not the right of anyone after the Messenger of Allah'".^{147,148}

In the opinion of the Ḥanbalites, if a *dhimmī* does this he will break his covenant. They have also stipulated other matters including the refusal to pay the *jizyah*, or the refusal to adopt the laws of Islam, or gathering to fight the Muslims, or committing

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¹⁴⁵ This is not found in the original. It is in the *Sunan* of Abū Dawūd in *Ḥudūd*; Chapter The law relating to he who curses the Prophet, no.4361.

¹⁴⁶ *ṣaḥīḥ*. It was related by Abū Dāwūd In *Ḥudūd*, Chapter The law relating to the blasphemer against the Prophet no.4361 p.1541; al-Nasā'ī 4075 p. 2354; and al-Dāraquṭnī 3:112; al-Ḥākim Muḥammad b. 'Abd Allah, *al-Mustadrak*, 4:354; al-Bayhaqī, *al-Sunan al-kubrā*, 10:131. Both al-Ḥākim and al-Dhahabī said: it is *ṣaḥīḥ*. See also, Ibn Taymiyyah, *al-Ṣārim al-maslūl 'lā shātim al-rasūl*, 2:140.

¹⁴⁷ *Sheet*; 165/A.

¹⁴⁸ *ṣaḥīḥ*. It was related by al-Nasā'ī In *Muḥārabah*, Chapter The law regarding one who curses the Prophet no.4076 p.2354; Abū Dāwūd 4363 p. 1541; Aḥmad 1:9; al-Ḥākim Muḥammad b. 'Abd Allah, *al-Mustadrak*, 4:354-355. Both al-Ḥākim and al-Dhahabī said it is *ṣaḥīḥ* and in accordance to the conditions of Bukhārī and Muslim.

adultery with a Muslim woman or marrying her, or turning a Muslim away from his religion, or blocking the highway, or aiding the Polytheists against the Muslims by spying against them and the like. Other schools have agreed upon some of these matters including killing Muslims, refusal of the *jizyah*, and refusal to adopt the laws of Islam. They have disputed about others. Al-Shāfi'ī said that they do not amount to a breaking of the covenant unless the Imam has stipulated these things in the contract of the covenant. If he has not stipulated them then they do not break the contract. Whoever breaks his contract by one of the aforementioned infringements will be treated as a *ḥarbī*. The infringement will be specific to him and will not apply to his relatives. Whoever does something which does not infringe the contract like slander or theft will be punished according to the crime; if it warrants the *ḥadd*, then it will be carried out upon him, otherwise he will be given *ta'zīr* (exemplary punishment).¹⁴⁹

[Issue 76] If the Imam makes a covenant with a people that whoever among them comes as a Muslim will be returned to them, or a compromise should be reached with them through money given to them by the Imam, the covenant should be honoured.

¹⁴⁹ See Ibn Qudāmah, *al-Mughnī*, 13:236-239; and Ibn al-Qayyim, *Aḥkām ahl al-dhimma*, 3:1357.

Al-Shāfi'ī said: It is not honoured except when the man who comes as a Muslim has a family who wish to prohibit him and he is returned to them.

- [185] (Bukhārī): 'Urwah, from al-Miswar, and Marwān who both said: 'The Messenger of Allah went out (from Madīnah) at the time of al-Ḥudaybiyah and they wrote amongst themselves a document, and he sent back Abū Jandal [i.e. to his people], then returned to Madīnah. Then Abū Baṣīr came to him and he sent him back [i.e. to his people]."¹⁵⁰

Ḥanbalī jurists explain the meaning of honoring a covenant as If non believers call for the restitution of anyone of them who became Muslim after a covenant had been made, then the Imam should not prevent the non believers from getting the Muslim back. On the contrary, the Imam should not force the Muslim to go back to them. The Imam can, rather tell the Muslim confidentially to escape and fight against the non-believers. Moreover, according to Ḥanbalī jurists, being in need, i.e. during the weakness or the defeat of the Muslim country, is a condition for such a covenant. Otherwise such a covenant is forbidden.¹⁵¹ They argue using the *ḥadīth* in which it is

¹⁵⁰ *ṣaḥīḥ*. This is part of a lengthy *ḥadīth* related by Aḥmad 4:323-326, and al-Bukhārī in *al-Shurūṭ*, Chapter 'Conditions in Jihād' no.2731 p.217; Abū Dāwūd 2765 p. 1429; Ibn Ḥibbān, 11:216-226 no. 4872; al-Bayhaqī, *al-Sunan al-kubrā*, 9:221-222; 'Abd al-Razzāq al-Ṣan'ānī, *al-Muṣannaḥ*, 5:330 no. 9720.

¹⁵¹ See al-Ḥajjawī, *Kashshāf al-qinā'*, 3:115.

mentioned that when Abū Baṣīr came to the Prophet after the Ḥudaybiyah covenant and the non-believers came asking for him the Prophet said to him: "Betrayal is not allowed in our religion. You know what we have already covenanted them and may Allah make a relief and an exit for you". So Abū Baṣīr went back with two of the non-believers. On their way, Abū Baṣīr was given a chance to kill one of them while the other hardly fled..." etc.¹⁵² al-Shāfi'ī gives as a reason for his above-mentioned view that such a Muslim might be misled and persecuted by the non-believers. Therefore, it is allowed in cases where a person has a family or a tribe that can offer him enough protection.¹⁵³

Al-Qarāfī Aḥmad b. Idrīs (d. 684/1285) reports that Muḥammad b. 'Alī al-Māzarī (d.536/1141)¹⁵⁴ said: If any of the men join us as a Muslim [i.e. after a covenant has taken place] he should, honourably, be returned. This is with the exception of women because Allah says: "You who have 'īmān! When women who have 'īmān come to you as *muhājirūn*, submit them to a test. Allah Has best knowledge of their 'īmān. If you know they are *mu'minūn*, do not return them to the *kuffār*."¹⁵⁵ And also as for

¹⁵² It is a piece of a lengthy *ḥadīth* related by al-Bukhārī, *al-jāmi' al-ṣaḥīḥ*, 2731-2732 p. 217-219.

¹⁵³ See al-Shāfi'ī, *al-'Um*, 4: ; Ibn Ḥajar *Fatḥ al-Bārī*, 5:349 ff.

¹⁵⁴ See Ibn Khallikān Aḥmad b. Muḥammad (d. 681/1282), *Wafayāt al-a'yān*, 4:285, al-Dhahabī, *Siyar a'lām al-nubalā'*, 20:104-107, Kaḥḥālāh, *Mu'jam al-mu'allifīn*, 11:32.

¹⁵⁵ *al-Mumtaḥanah*, 60:10

their apostasy is more likely. It is also said that all [i.e. men and women] should not be returned because of the honour of Islam.”¹⁵⁶

[Issue 77] A *dhimmī* is prohibited from settling in the Ḥijāz.

It is permissible according to Abū Ḥanīfah.

[186] (Tirmidhī): Ibn Jurayj, from Abū al-Zubayr, who heard Jābir saying:

‘Umar said to me that he heard the Messenger of Allah saying: “I will expel the Christians and the Jews from the Arabian Peninsula and I will not allow anyone other than a Muslim.”¹⁵⁷

Tirmidhī considered this to be *ṣaḥīḥ*.

[Issue 78] Dilapidated or destroyed synagogues and churches are not to be rebuilt.

This narration is the choice of Abū Sa‘īd al-Iṣṭakhrī, and Ibn Abī Hurayrah among the Shāfi‘īs.

From Aḥmad also: It is allowed, as is the opinion of most of the jurists.

¹⁵⁶ See al-Qarāfī Aḥmad b. ‘Idrīs, *al-Dhakhīrah*, 3:449.

Also from him: What has decayed can be repaired.

- [187] **It is related from ‘Umar in a *marfū‘* form: “No church is to be built in Islam, nor are any that are ruined to be renovated.”¹⁵⁸**

I [i.e. al-Dhahabī] say this is not *ṣaḥīḥ*.

Scholars have differed regarding this issue. Three opinions have been related from Imam Aḥmad; one, mentioned by the author, that it is not permitted to rebuild demolished buildings or to repair dilapidated ones and this is the preference of Qāḍī Abū Ya‘lā of the Ḥanbalites, and Taqī al-Dīn al-Subkī of the Shāfi‘ites.¹⁵⁹ The second opinion is that building and repairing is allowed which is the opinion of some Ḥanbalite scholars. The third opinion is that repairs are allowed but not building, which is the opinion of the majority of the scholars of the Ḥanbalite school and is well known of this school. The reason for distinguishing between repairing and

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¹⁵⁷ *ṣaḥīḥ*. It was related by al-Tirmidhī In *al-Siyar*; Chapter 'Regarding expelling the Jews and Christians from the Arabian Peninsula' no.1607 p.1817; Muslim 1767 p. 991; Abū Dāwūd 3030 p. 1451 and Aḥmad 1:29.

¹⁵⁸ *ḍa‘īf jiddan* (very weak.) It was related by Ibn ‘Adī, *al-Kāmil*, 3:1199; Ibn Ḥayyān ‘Abd Allah b. Muḥammad, *Ṭabaqāt al-muḥaddithīn bi Aṣḥabihān*, 3:38 both from Sa‘īd b. Sinān al-Ḥimṣī, from Abū al-Zāhiriyyah, from Kathīr b. Murrah, from ‘Umar. This *isnād* is very weak due to Sinān b. Sa‘īd who was considered so by many *ḥadīth* jurists such as Aḥmad, Ibn Ma‘īn, al-Bukhārī and others. See also, al-Dhahabī, *Mẓān al-‘itidāl*, 2: 333-335.

¹⁵⁹ See ‘*Fatāwā*’ of al-Subkī, 2:382-389.

building is a dispute in considering building to be a continuation of a previous state of affairs or to be the bringing about of a new state of affairs. Those who prohibited building said that it was the creation of a place in which disbelief in Allah and evil practices would take place and this is something upon which it has been agreed that it is not permissible. Those who allowed it said that it was the continuation of a previous state of affairs and that agreement had been reached about it with the unbelievers and that they have been allowed to practise their religion and that this was part of their religion and to maintain it is permissible whether that be repairing churches and synagogues or building them if they were destroyed. This is the more correct opinion and the evidence for it is the most powerful.

Islamic cities can be divided into three types: firstly, those founded by Muslims like Baṣrah, Kūfah, Baghdād, and Cairo where it is not permissible, by consensus of jurists, to found churches or places of worship for non-Muslims. They argue using the report related by way of Ḥanash,¹⁶⁰ from 'Ikrimah, that Ibn 'Abbās said: "Every land founded by Muslims should not have any synagogue or church built therein nor should church bells be rung there, nor should swine flesh be sold there."¹⁶¹

¹⁶⁰ Ḥanash is his epithet and his name is Ḥussayn b. Qays al-Raḥabī. Aḥmad, al-Nasā'ī, al-Dāraquṭnī, and Ibn Ḥajar said that he is *matrūk*. See al-Dhahabī, *Lisān al-Mẓān*, 2:69; and Ibn Ḥajar, *al-Taqrīb*, p.249.

¹⁶¹ *ḍa'if*. It was related by Ibn Abī Shaybah, *al-Muṣannaḥ*, 6:467; 'Abd al-Razzāq, *al-Muṣannaḥ*, 6:60; and al-Bayhaqī 9:201-202.

They also argue using the *ḥadīth* of Ibn 'Abbās that the Messenger of Allah said: "There is to be no *ikhṣā'* (emasculatation) in Islam and no building of churches."¹⁶²

They also argue using what Sa'īd b. Sinān¹⁶³ related from Ibn al-Zāhiriyyah¹⁶⁴, from Kathīr b. Murrah, from 'Umar b. al-Khaṭṭāb, that the Messenger of Allah said: "No church should be made in Islam nor should any dilapidated churches be renewed."¹⁶⁵

The second type of city is those conquered by Muslims by force. No church should be build there by agreement, because it has become under the dominion of the Muslims. It was asked whether churches should be destroyed therein. Mālikites and some Ḥanbalites said that they should not be destroyed, because the Prophetic Companions conquered many lands by force and did not destroy any churches. The existence of churches and synagogues in lands conquered by Muslims by force testify to the correctness of this. Ibn Abī Shaybah related from Ḥaṣṣ b. Ghiyāth, that

¹⁶² *ḍa'īf*. It contains 'Abd Allah b. Lahī'ah. Ibn Ḥajar considered this *ḥadīth* to be *ḍa'īf* in his '*al-Dīrāyah fī takhrīj al-ḥadīth al-hidāyah*' 2:130; and al-Zayla'ī in his *Naṣab al-rāyah*, 3:453.

¹⁶³ Sa'īd b. Sinān, Abū Maḥdī al-Ḥimṣī is *matrūk* and was accused by al-Dāraqutnī and others of fabricating *ḥadīths*, although he was known for acts of worship and abstinence. See al-Dhahabī, '*Mẓān al-i'tidāl*' 2:333-335; and '*al-Kāshif*' 1:438; and Ibn Ḥajar, '*al-Taqrīb*' p.381.

¹⁶⁴ His name is Ḥudayr b. Kurayb al-Ḥimṣī and he is *thiqah* (d.128 h.) See al-Dhahabī, '*al-Kāshif*'.

¹⁶⁵ *ḍa'īf*. It was related by Abū al-Shaykh b. Ḥayyān, '*Ṭabaqāt al-muḥaddithīn bi-Iṣbihān*', 3:39; and Ibn 'Adī, '*al-Kāmil*', 3:1199. The isnād is *ḍa'īf* because of Sa'īd b. Sinān. See Ibn Ḥajar, '*al-Talkhīṣ al-ḥabīr*', 4:128.

'Ubayy b. 'Abd Allah said: "A letter of 'Umar b. 'Abd al-'Azīz arrived saying: 'No church should be destroyed nor any synagogue or house of fire which is part of a peace treaty.'"¹⁶⁶

Some Shāfi'ites and Ḥanbalites have said that it is compulsory to destroy them and that the unbelievers are not permitted to remain with a church because it is now a land owned by Muslims and it is not allowed that there be a synagogue there, as in the lands founded by Muslims. The Ḥanafites have said that they are not to be destroyed but that they should remain in their hands as dwelling houses but they are prohibited from using them for worship.

The third type is those cities conquered by the Muslims peacefully. If the Imam makes peace with them on the basis that the land belongs to them but that the *kharāj* (land tax) to be paid to the Muslims, then they may build whatever they want of churches in the opinion of the Ḥanafites, Mālikites, and Ḥanbalites. It is also the most correct in the Shāfi'ite school, because the ownership and the abode belongs to them and they may do as they please there.¹⁶⁷

¹⁶⁶ See Ibn Abī Shaybah, *al-Muṣannaḡ*, 6:471.

¹⁶⁷ See Ibn Qudāmah, *al-Mughnī*, 13:239-242; al-Subkī *al-Fatāwā*, 2:370; Ibn al-Humām, *Fatḥ al-Qadīr*, 6:58-59; al-Sarakhsī, *Sharḥ al-Siyar al-kabīr*, 4:1530-1532; Ibn al-Qayyim *Aḥkām ahl al-dhimma*, 3:121; al-Mirdāwī al-Ḥanbalī, *al-Inṣāf fī ma'rifat al-rājiḥ min al-khilāf*, 4:236; Ibn Rajāb al-Ḥanbalī, *al-Qawā'id*, Qā'idah no. 142, p.314; *Mawāhib al-Jalīl sharḥ Mukhtaṣar Khalīl*, 3:385; *al-Mawsū'ah al-fiqhīyah*, 7:129.

CONCLUSIONS

In this study, I came to a number of significant results. These were:

1. The necessity to highlight the *fiqh* aspect of al-Dhahabī and to explain his *madhhab* by editing some of his manuscripts where he abridged significant *fiqh* books, like the abridgement of *al-Muḥallā* of Ibn Ḥazm al-Andalusī. This need is further felt in view of al-Dhahabī's eminent scholarship, his research impartiality and his integrity of judgment.
2. The study has highlighted the tremendous effort exerted by the Muslim scholars, especially the jurists and the scholars of *ḥadīth*, to serve the Qur'ān and the *sunnah* and to explain the legal rules in both of them. These efforts have undoubtedly, had their positive impact on human civilization, in terms of developing quite sound and sophisticated methods of scientific research, investigation, debating, and argumentation.
3. This study has also drawn our attention to the fact that when reading Islamic jurisprudence, one must bear in mind that distinction should be made between things that are part of Islamic *sharī'ah* and things that are part of Islamic jurisprudence. Some issues are quite simply based on the two revealed sources of Islam, the Qur'ān, the *sunnah*, and the consensus of Muslim *ummah* (*Ijmā'*). Such issues and such rules simply cannot be changed or altered. They are not subject to *ijtihād* or modification, like the issue of *tawḥīd* (Unity of God), the obligation of prayers, the other pillars of

Islam, and Islamic morals. On the other hand, there are *fiqh* issues, which represent the various viewpoints of the jurists and the *mujtahids*. These are subject to discussion and revision in accordance with the conditions and constraints well defined in the fundamentals of Islamic Jurisprudence.

4. The comprehensive nature of the *sharī'ah* and its flexibility to suit all times and all places. This because it embodies all that is needed by human societies in terms of rules and laws which regulate all walks of life, like criminal laws (*jīnāyāt*), penal laws (*ḥudūd*) and laws governing international relations (*jihad & siyar*).

5. The obligation of *jihad*, according to the Qur'ān *sunnaḥ* and previous scholars' consensus, is a non-controversial issue. Also non-controversial is its classification into two categories: defensive *jihad* and offensive *jihad*. Both categories represent highly rated physical and financial forms of worship in Islamic religion. *Jihad* in its real concept will remain and will continue till the Day of Resurrection. However, fulfilling the duty of *jihad* should be done according to the situation of the Muslims and their degree of strength or weakness.

6. Prior to discussing different *fiqh* matters, it should be noted that *fiqh* issues can be divided into two main categories. The first category includes those issues that are agreed upon. That is to say, they are not controversial or disputed areas of the faith, such as the articles of faith and morals. The second category includes those issues that are considered controversial with the resulting variant scholarly rulings. Such

controversial issues can be further sub-divided into a further two categories. The first relates to disagreement because of diversity and the second comprises disagreement because of contradiction.

7. In this context, it should be noted that controversial opinions should not be considered legitimate unless they have valid and reasonable evidence to support them. When controversial issues are being discussed, it is essential in such situations to adhere to the Islamic ethics of disagreement in order to avoid the ill consequences of disagreement.

8. The Ḥanbalī school of law is placed between two other schools in terms of their judicial judgment on *fiqh* issues. They take a moderate stand between the Zāhri school, which adheres to the literalism of the text, and the school of *ra'y* (the opinion people), which relies on reason and analogy rather than tradition. The Ḥanbalī school then, in matters of Islamic rulings, adopt a stance that combines the text and the *fiqh* of the *ḥadīth*.

9. On this basis, it is not acceptable to indict the Ḥanbalī school with extremism so long as they provide valid evidence in their argument. In doing so, the *Sharī'ah* also becomes tainted with the idea of extremism, and this, in and of itself, is a wholly inappropriate and incorrect assertion.

10. This study demonstrates al-Dhahabī's talent of *fiqh* in addition to his sound

knowledge of the science of *ḥadīth*. This study also reveals that al-Dhahabī was amongst the moderate scholars. Although he adhered to the teachings of the Shāfi'ī *madhhab*, he also assessed the Ḥanbalī books. On occasion, he agreed with the Ḥanbalī rulings, whilst at other times he did not. This was, of course, due to his keen evaluation of the evidence put forth in support of any ruling. Further, this illustrates the extent to which al-Dhahabī was influenced by the Ḥanbalī *madhhab*. This was, for the most part, due to the Ḥanbalī background of both his teachers and contemporary learned colleagues.

11. In essence, the focus of this book was the prevailing controversial issues with little written in the way of the issues which were agreed upon by consensus of the scholars. Proportionately speaking, the controversial issues constitute only a small percentage of *fiqh* issues.

12. According to Islamic *Sharī'ah*, religion plays a fundamental role in distinguishing between either individuals or societies. In this regard, a Muslim has more sanctity than the disbeliever, who is considered to be either *dhimmī* or *ḥarbī*. Moreover, lands of Islam have regulation and laws applied to them that differ from those of lands of *kufr*. This is, generally speaking, agreed upon by the four *madhabs* regardless of their minor differences over the details of such status.

13. The consensus among the scholars from the four *madhabs* is to divide all countries into two categories, that of, Islamic countries and *kufr* countries.

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كتاب الجنائيات

[مسألة 1] لا يقتل مسلم بكافر

وقال أبو حنيفة¹: يقتل بالذمي.

لنا:

[1] (خ) مطرف²، عن الشعبي³، عن أبي حنيفة⁴: سألت علياً⁵: (هل عندكم من رسول

الله ﷺ شيء بعد القرآن؟ قال: لا والذي فلق الحبة، وبرأ النسمة، إلا فهم يؤتيه الله

¹ النعمان بن ثابت الكوفي، إمام المذهب المعروف، ولد سنة 80، ومات في رجب سنة 150. انظر تذكرة الحفاظ للذهبي 168/1.

² مطرف بن طريف الكوفي، ثقة إمام عابد، مات سنة 143هـ، أخرج له أحاب الكتب الستة. انظر الكاشف للذهبي ترجمة 5477.

³ عامر بن شراحيل أبو عمرو الشعبي، أحد الفقهاء، ولد زمن عمر بن الخطاب، ومات سنة 103 أو 104. انظر الكاشف ترجمة 2531.

⁴ وهب بن عبد الله السوائي، صحابي توفي سنة 74. انظر الكاشف ترجمة 6111.

⁵ علي بن أبي طالب، ابن عم رسول الله صلى الله عليه وسلم، توفي سنة 40. انظر تهذيب التهذيب لابن حجر: 202/4. طبع دار المعرفة بيروت 1996.

رجلا في القرآن، وما في هذه الصحيفة. قلت: وما في هذه الصحيفة؟ قال: العقل⁶،

وفكاك الأسير، ولا يقتل مسلم بكافر⁷.

[2] أحمد⁸: نا يحيى⁹، نا ابن أبي عروبة¹⁰، نا قتادة¹¹، عن الحسن¹²، عن قيس بن عباد¹³

قال: (انطلقت أنا والأشتر إلى علي عليه السلام¹⁴، فقلنا: هل عهد إليك نبي الله

⁶ العقل الدية، وهي المال المودى إلى المجني عليه أو إلى أوليائه، والعاقلة هي الجماعة التي تغرم دية المقتول، وذلك لأنهم كانوا يعقلون الإبل أي يربطونها بفناء أولياء المقتول. انظر "المطلع على أبواب المقنع" ص 363، 368 تأليف محمد بن أبي الفتح الحنبلي (ت 709هـ) طبع وتحقيق المكتب الإسلامي 1981 بيروت.

⁷ صحيح. أخرجه أحمد: 35/2 برقم 600 بتحقيق أحمد شاكر، والبخاري في الجهاد باب فكاك الأسير ص 245 برقم 3047، وغيرهما.

⁸ أحمد بن محمد بن حنبل الشيباني، صاحب المذهب المعروف، وصاحب المسند، ولد ببغداد وتوفي سنة 241. انظر تهذيب التهذيب لابن حجر: 113/1.

⁹ يحيى بن سعيد بن فروخ القطان، أحد أئمة الحديث وحفاظه، ولد سنة 120 وتوفي سنة 198 وكان رأساً في العلم والعمل. انظر الكاشف للذهبي ترجمة 6175.

¹⁰ اسمه سعيد بن مهران الشكري، أبو النضر، ثقة. قال الإمام أحمد: كان يحفظ ولم يكن له كتاب، توفي سنة 156. انظر الكاشف للذهبي ترجمة 1933.

¹¹ قتادة، بن دعامة السدوسي، الحافظ المفسر، كان أعمى، وتوفي كهلاً سنة 118. انظر الكاشف للذهبي ترجمة 4551.

¹² أبو سعيد الحسن بن أبي الحسن يسار البصري، أحد الفقهاء الثقات، وقال ابن المديني: مراسلاته إذا رواها عنه الثقات صحاح. مات سنة 110. انظر تهذيب التهذيب لابن حجر: 388/1-391.

¹³ أبو عبد الله القيسي، كان شيعياً، خرج مع ابن الأشعث فقتله الحجاج صبراً، أخرج له أصحاب الكتب الستة إلا ابن ماجه. انظر الكاشف للذهبي ترجمة 4608.

¹⁴ في الأصل: "السلم".

ﷺ شيئاً لم يعهده إلى الناس عامة؟ قال: لا، إلا ما في كتابي هذا، قال: وكتاب في

قرباب سيفه، فإذا فيه: المؤمنون تتكافأ دماؤهم، وهم يد¹⁵ على من سواهم،

ويسعى بذمتهم أدناهم، ألا لا يقتل مؤمن بكافر، ولا ذو عهد في عهده¹⁶.

[3] محمد بن راشد¹⁷، عن سليمان بن موسى¹⁸، عن عمرو بن شعيب¹⁹، عن أبيه²⁰،

عن جده²¹: (أن النبي ﷺ قضى ألا يقتل مسلم بكافر)²².

¹⁵ اليد: القوة. انظر "معجم مقاييس اللغة" تأليف أحمد بن فارس: 151/6 تحقيق عبد السلام هارون طبع دار الجيل بيروت الطبعة الأولى 1991، وقال ابن الجوزي: "أي هم مجتمعون يتعاونون فلا يسعهم التخاذل". "غريب الحديث" 2: 509 طبعة دار الكتب العلمية بيروت 1985.

¹⁶ صحيح. أخرجه أحمد في المسند: 1 : 123 برقم 993، وعنه أبو داود في الدييات باب أيقاد المسلم من الكافر؟ ص 1556 برقم 4530، وأخرجه أيضاً النسائي في القسامة باب القود بين الأحرار والمماليك في النفس: ص 2394 برقم 4738 وفي إسناده قتادة بن دعامة السدوسي والحسن البصري وكلاهما مدلس، وقد عتناه، وصححه الحاكم في المستدرک، وقد تقدم من رواية أبي جحيفة عند البخاري.

¹⁷ محمد بن راشد المكحولي، دمشقي نزل البصرة، وثقه أحمد بن حنبل وجماعة. انظر الكاشف للذهبي ترجمة 4842.
¹⁸ الأموي الدمشقي الأشدق، قال النسائي: ليس بالقوي، وقال البخاري: عنده مناكير. خرج له مسلم في مقدمة الصحيح، وتوفي سنة 119. انظر الكاشف للذهبي ترجمة 2133.

¹⁹ عمرو بن شعيب بن محمد بن عبد الله بن عمرو بن العاص، قال يحيى بن سعيد القطان: إذا روى عنه ثقة فهو حجة وقال أحمد: ربما احتجنا به، وقال أبو داود: ليس بحجة. مات بالطائف سنة 118. انظر الكاشف للذهبي ترجمة 4173. والمراد بالجد في الإسناد عبد الله بن عمرو بن العاص، وهو جد شعيب. وانظر تفصيل الأقوال في الاحتجاج بعمرو بن شعيب في انظر تهذيب التهذيب لابن حجر: 332/4-336.

[4] إبراهيم بن طهمان²³، عن عبد العزيز بن رفيع²⁴، عن عبيد بن عمير²⁵، عن

عائشة²⁶، عن رسول الله ﷺ قال: (لا يحل قتل مسلم إلا في إحدى ثلاث خصال:

²⁰ شعيب بن محمد بن عبد الله بن عمرو بن العاص، صدوق ثبت سماعه من جده. انظر تقريب التهذيب لابن حجر ترجمة 2806.

²¹ هو عبد الله بن عمرو بن العاص، من علماء الصحابة وعبادهم، مات بالطائف وقيل بمصر سنة 65. انظر الكاشف للذهبي ترجمة 2879.

²² صحيح. أخرجه أحمد 178/2، 180، 192، والترمذي ص 1794 برقم 1413، وأبوداود ص 1553 برقم 4506.

²³ أبو سعيد الخراساني، وثقه أحمد وأبو حاتم، مات سنة بضع وستين ومائة، أخرج له أصحاب الكتب الستة. انظر الكاشف للذهبي ترجمة 148.

²⁴ من أهل الكوفة، ثقة معمر، أبصر عائشة، مات سنة 130، وأخرج له أصحاب الكتب الستة. انظر الكاشف للذهبي ترجمة 3386.

²⁵ أبو عاصم المكي، من كبار التابعين، قال ابن معين وأبو زرعة: ثقة توفي سنة 74. انظر الكاشف للذهبي ترجمة 3626، وتهذيب التهذيب لابن حجر: 38/3.

²⁶ عائشة بنت أبي بكر الصديق، أم المؤمنين، أفقه النساء مطلقا، وأفضل أزواج النبي صلى الله عليه وسلم، إلا حديثا فبينهما خلاف شهر، ماتت سنة 57 على الصحيح. تقريب التهذيب لابن حجر ترجمة 8633.

زان محصن²⁷ فيرجم، ورجل يقتل مسلماً متعمداً، ورجل يخرج من الإسلام،

فيحارب الله ورسوله، فيقتل، أو يصلب، أو ينفي من الأرض²⁸.

احتجوا:

[5] بعمار بن مطر²⁹، نا إبراهيم بن أبي يحيى³⁰، عن ربيعة³¹، عن ابن البيلمي³²، عن

ابن عمر³³: (أن رسول الله ﷺ قتل مسلماً بمعاهد وقال: أنا أكرم من وفي

بذمته)³⁴.

²⁷ يقال: أحصنت المرأة زوجها فهو محصن، وأحصنها زوجها فهي محصنة، وقد جاء الإحصان بمعان أخرى منها:

الإسلام، والحرية، والعفاف، والتزويج. والمحصن في حد الزنا غير المحصن في حد القذف. انظر "المطلع" ص371.

²⁸ صحيح. رواه النسائي في السنن الكبرى 219/4 برقم 6954، وأبو داود ص1540 برقم 4353.

²⁹ أبو عثمان الراهاوي، هالك، قال ابن حبان: كان يسرق الحديث، وقال العقيلي: يحدث عن الثقات بالمناكير، وقلل

أبو حاتم: كان يكذب، وقال الدارقطني: ضعيف. انظر الميزان للذهبي: 90-89/4.

³⁰ أبو إسحاق الأسلمي مولاهم، المدني الفقيه، ولد في حدود سنة مائة. قال أحمد: قدرى جهمي، تركوا حديثه، وقال

النسائي وغيره: متروك الحديث. انظر سير أعلام النبلاء للذهبي: 450-454/8.

³¹ ربيعة بن سليم أو ابن أبي سليم المصري، وثق، أخرج له الترمذي. انظر الكاشف للذهبي ترجمة 1544. وقال ابن

حجر: مقبول. التقريب ترجمة 1905.

³² اسمه عبد الرحمن، كان من فحول الشعراء، قال أبو حاتم: لين، وذكره ابن حبان في الثقات. انظر الكاشف للذهبي

ترجمة 3157. وقال ابن حجر: مدني ضعيف. انظر التقريب ترجمة 3819.

قال الدارقطني³⁵: لم يسنده غير إبراهيم، وهو متروك. وصوابه مرسل، وابن

البيلماني ضعيف.

قال عبد الرحمن بن زياد: قلت³⁶: إن قراءكم يقولون: إنا ندرأ الحدود

بالشبهات³⁷، وإنكم جئتم إلى أعظم الشبهات، فأقدمتم عليها، قال: وما هو: قلت:

المسلم يقتل بالكافر. قال: فاشهد أنت على رجوعي عن هذا.

³³ عبد الله بن عمر بن الخطاب، أبو عبد الرحمن العدوي، صحابي شهد غزوة الأحزاب والحديبية، مات سنة 74. انظر الكاشف للذهبي ترجمة 2871.

³⁴ ضعيف. رواه الدارقطني: 134/3-135. وانظر نصب الراية للزيلعي: 335/4، وفتح الباري لابن حجر: 262/12.

³⁵ أبو الحسن علي بن عمر البغدادي، الحافظ المشهور صاحب السنن، ولد سنة 306، قال الذهبي: "إذا أردت أن تبين براعة هذا الإمام فطالع "العلل" له فإنك تدهش ويطول تعجبك". توفي في ذي القعدة سنة 385. انظر تذكرة الحفاظ للذهبي: 991/3-995.

³⁶ كذا في الأصل، وفيه سقط، وصواب العبارة: "عن عبد الرحمن بن مهدي، عن عبد الواحد بن زياد قال: قلت لزفر: "...". انظر معرفة السنن والآثار للبيهقي: 6: 153، والسنن الكبرى للبيهقي أيضا: 8: 31، وفتح الباري لابن حجر، وصحح إسناده: 12: 262. والقصة ذكرها الذهبي أيضا في سير أعلام النبلاء في ترجمة زفر: 8: 40 وقال معقبا: "هكذا يكون العالم وقافا مع النص".

وقد ذكروا أن الذي قتله رسول الله ﷺ بالذمي، عمرو بن أمية الضمري³⁸،

وعمره عاش بعد النبي ﷺ سنين.

قالوا: فقد قتل علي رضي الله عنه مسلماً بكافر.

قلنا: ليس كذا الحديث.

[6] قال الدارقطني: نا ابن عقدة³⁹، نا محمد بن أحمد بن الحسن⁴⁰، نا محمد بن عديس⁴¹،

نا يونس بن أرقم⁴²، عن شعبة⁴³، عن الحكم⁴⁴، عن حسين بن ميمون⁴⁵، عن أبي

الجنوب⁴⁶ قال: قال علي: (من كانت له ذمتنا فدمه كدمائنا)⁴⁷.

وعبد الرحمن بن مهدي، أبو سعيد البصري، ثقة ثبت حافظ عارف بالرجال والحديث، مات سنة 198. كما في التقريب لابن حجر ترجمة 4018. وعبد الواحد بن زياد البصري ثقة، وفي حديثه عن الأعمش وحده مقال، مات سنة 176 وقيل بعدها. كما في التقريب أيضا ترجمة 4240.

³⁷ لوحة 150/ب.

³⁸ وهو صحابي مشهور، مات بالمدينة في خلافة معاوية، وأورده ابن الجوزي في المنتظم 235/5 فيمن توفي من الصحابة في سنة 50 من الهجرة، وعنه نقل ابن كثير في البداية والنهاية: 219/11، وانظر الإصابة لابن حجر: 496/4.

³⁹ أحمد بن محمد أبو العباس الكوفي، أحد أعلام الحديث، صاحب التصانيف على ضعف فيه مات سنة 332. انظر سير أعلام النبلاء للذهبي: 355، 340/15.

أبو الجنوب ضعيف.

ثم نحمله على أن دمه محرم كتحریم دماننا.

[مسألة 2] لا يقتل حر بعبد

وقال أبو حنيفة: يقتل بعبد غيره.

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- ⁴⁰ هو القطواني. انظر المؤلف والمختلف للدارقطني 3/ 1550.
- ⁴¹ من أهل الكوفة. انظر المؤلف والمختلف للدارقطني 3/ 1550.
- ⁴² هو الكندي البصري، قال البخاري: معروف الحديث، وكان يتشيع، وكذا قال ابن حبان. انظر تعجيل المنفعة لابن حجر: 391/2-392.
- ⁴³ شعبة بن الحجاج، أبو بسطام العتكي، أمير المؤمنين في الحديث، ثبت حجة، ويخطئ في الأسماء قليلا، مات سنة 160، أخرج له أصحاب الكتب الستة. انظر الكاشف للذهبي ترجمة 2278.
- ⁴⁴ الحكم بن عتيبة الكندي مولاهم، فقيه عابد ثقة، صاحب سنة، توفي سنة 115، أخرج له أصحاب الكتب الستة. انظر الكاشف للذهبي ترجمة 1185.
- ⁴⁵ الحنذلي الكوفي، قال أبو حاتم: ليس بالقوي. انظر الكاشف للذهبي ترجمة 1114.
- ⁴⁶ هو عقبة بن علقمة الشكري، ضعف، أخرج له الترمذي. انظر الكاشف للذهبي ترجمة 3844.
- ⁴⁷ ضعيف. أخرجه الدارقطني: 3/ 147-148، والبيهقي في السنن الكبرى: 34/8 ولفظه: عن أبي الجنوب الأسدي قال: "أتي علي بن أبي طالب رضي الله تعالى عنه برجل من المسلمين قتل رجلا من أهل الذمة. قال: فقامت عليه البيعة، فأمر بقتله، فجاء أخوه فقال: إني قد عفوت. قال: فلعلهم هددوك، وفرقوك وفزعوك؟ قال: لا، ولكن قتله لا يرد علي أخي، وعوضوني فرضيت. قال: أنت أعلم. من كان له ذمتنا فدمه كدمنا وديته كديتنا".

وقال داود⁴⁸: يقتل بعبد.

[7] لنا: الدارقطني من طريق عثمان البري⁴⁹، عن جوير⁵⁰، عن الضحاك⁵¹، عن ابن

عباس⁵²، عن النبي ﷺ قال: (لا يقتل حر بعبد)⁵³.

[8] إسرائيل⁵⁴، عن جابر الجعفي⁵⁵، عن عامر⁵⁶: قال علي: (من السنة أن لا يقتل

مسلم بكافر ولا حر بعبد)⁵⁷.

⁴⁸ هو داود بن علي، أبو سليمان الأصبهاني، إمام الظاهرية، ولد سنة 200، ومات في رمضان سنة 270. انظر تذكرة الحفاظ للذهبي 572/2.

⁴⁹ أبو سلمة البصري، تركه عبد الله بن المبارك، وكان قليل الحديث، وقال ابن معين ليس بشيء، وقال النسائي: متروك. انظر سير أعلام النبلاء للذهبي: 325/7-326.

⁵⁰ جوير بن سعيد البلخي، تركوه، أخرج له ابن ماجه. الكاشف ترجمة 826.

⁵¹ الضحاك بن مزاحم الهلالي، أبو محمد الخراساني، صدوق كثير الإرسال، مات بعد المائة، أخرج له أصحاب السنن الأربعة. التقريب لابن حجر ترجمة 2978.

⁵² عبد الله بن عباس بن عبد المطلب الهاشمي، ترجمان القرآن، يسمى الخبر، أو البحر، توفي بالطائف سنة 68. انظر الكاشف للذهبي ترجمة 2800.

⁵³ ضعيف جدا. أخرجه الدارقطني 133/3.

⁵⁴ إسرائيل بن يونس قال أحمد: ثقة، وضعفه ابن المديني، توفي سنة 162. انظر الكاشف للذهبي ترجمة 336.

⁵⁵ من أكبر علماء الشيعة، وثقه شعبة فشذ، وتركه الحفاظ، قال أبو داود: ليس في كتابي له شيء سوى حديث السهو، مات سنة 128. انظر الكاشف للذهبي ترجمة 739.

⁵⁶ هو الشعبي تقدم ذكره في حديث رقم 1.

⁵⁷ ضعيف. رواه الدارقطني: 133/3، والبيهقي في السنن الكبرى: 34/8.

[9] إسماعيل بن عياش⁵⁸، عن الأوزاعي⁵⁹، [عن عمرو بن شعيب]⁶⁰ عن أبيه، عن جده:

(أن رجلا قتل عبده متعمدا، فجلده النبي ﷺ مائة، ونفاه سنة، ومحا سهمه من

المسلمين، وأمره أن يعتق رقبة).

رواه الدارقطني⁶¹: نا الحسين بن الحسن⁶² الأنطاكي⁶³، نا محمد بن عبد الحكم

الرملي، نا محمد بن عبد العزيز الرملي⁶⁴، نا إسماعيل.

فجوير، والبري، وجابر، وابن عياش ضعفاء.

فاحتجوا:

⁵⁸ أبو عتبة العنسي، عالم الشاميين، قال البخاري إذا حدث عن أهل حمص فحديثه صحيح، وقال أبو حاتم: لين، مات سنة 181. انظر الكاشف للذهبي ترجمة 400.

⁵⁹ عبد الرحمن بن عمرو، أبو عمرو الأوزاعي الحافظ الفقيه الزاهد، شيخ الإسلام كان رأسا في العلم والعبادة، مات سنة 157. انظر الكاشف للذهبي ترجمة 3278.

⁶⁰ ليست في الأصل: وهي في "التحقيق" لابن الجوزي: 2: 311، والسنن الكبرى للبيهقي: 8: 36.

⁶¹ ضعيف. أخرجه الدارقطني في سننه: 3: 143، وفيه زيادة: "ولم يقده به" بعد قوله: "ومحا سهمه..". وأخرجه أيضا ابن ماجه في الدييات باب هل يقتل الحر بالعبد ص 2637 برقم 2664.

⁶² كذا في المخطوط "الحسن" وفي تاريخ بغداد للخطيب: 39/8، والمنتظم لابن الجوزي 301/13: "الحسين". وأشار محقق كتاب المنتظم إلى أنه ورد في نسخة "الحسن". انظر المراجع السابقة.

⁶³ قال الدارقطني والخطيب البغدادي: ثقة، توفي ببغداد سنة 319.

[10] بهشام⁶⁵، عن الحسن، عن سمرة، عن النبي ﷺ قال: (من قتل عبده قتلناه، ومن

جدع⁶⁶ عبده جدعناه)⁶⁷.

فالحسن لم يسمع من سمرة. قاله ابن حبان⁶⁸.

ثم هذا على وجه الوعيد⁶⁹، وقد يتوعد بما لا يفعل، ومنه:

[11] (فإن شربها في الرابعة فاقتلوه)⁷⁰.

قلت: هذا خلف من القول.

⁶⁴ روى عنه البخاري، وقال يعقوب الفسوي: حافظ، ولينه غيره. انظر الكاشف للذهبي ترجمة 5011.

⁶⁵ هشام بن حسان الأزدي مولا هم الحافظ، مات في صفر سنة 148. انظر الكاشف للذهبي ترجمة 5959.

⁶⁶ الجدع: جنس من القطع، يقال: جدع أنفه. "معجم مقاييس اللغة" 1: 432، و"المطلع": 365.

⁶⁷ ضعيف. أخرجه أحمد: 10/5.

⁶⁸ انظر ترجمته في الثقات لابن حبان: 123/4.

⁶⁹ انظر مزيدا من التوضيح كتاب "تأويل مختلف الحديث لابن قتيبة الدينوري ص 96.

⁷⁰ صحيح. أخرجه أحمد 166/2، والحاكم 372/4 من حديث عبد الله بن عمرو بن العاص، وأخرجه أحمد 280/2،

وأبو داود ص 1551 برقم 4484، والنسائي ص 2448 برقم 5665 من حديث أبي هريرة رضي الله عنه مرفوعا بلفظ:

"فاضربوا عنقه". وروي أيضا من حديث عبد الله بن عمر بن الخطاب ومعاوية بن أبي سفيان.

[مسألة 3] لا يقتل أب بابنه

وقال مالك⁷¹: إذا أضجعه فذبحه قتل به.

وقال داود: يقتل بابنه.

لنا:

[12] ابن لهيعة⁷²، عن عمرو بن شعيب، عن أبيه، عن جده⁷³: أن رسول الله ﷺ قال:

(لا يقاد⁷⁵ والد من ولده). رواه أحمد⁷⁶.

⁷¹ مالك بن أنس الأصبغي، الإمام صاحب المذهب المعروف، وصاحب كتاب "الموطأ"، قال عبد الله بن الإمام أحمد قلت لأبي: من أثبت أصحاب الزهري؟ قال: مالك أثبت في كل شيء توفي سنة 179. انظر تذكرة الحفاظ للذهبي: 207/1-213.

⁷² هو عبد الله بن لهيعة، أبو عبد الرحمن الحضرمي، الفقيه قاضي مصر. قال الذهبي: العمل على تضعيف حديثه، توفي سنة 174. انظر الكاشف للذهبي ترجمة 2934.

⁷³ كذا في الأصل، وفي المسند: 22/1 زيادة: "عن عمر بن الخطاب".

⁷⁴ لوحة 151/أ.

⁷⁵ من القود وهو القصاص، وقتل القاتل بدل القتل. "المطلع" ص 357.

⁷⁶ صحيح. رواه أحمد في المسند: 22/1.

[13] (ت) أبو خالد الأحمر⁷⁷، عن حجاج بن أرطاة⁷⁸، عن عمرو بن شعيب، عن أبيه،

عن جده، عن عمر⁷⁹: سمعت رسول الله ﷺ يقول: (لا يقاد الوالد بالولد)⁸⁰.

[14] (ت) إسماعيل بن عياش، نا المثنى بن الصباح⁸¹، عن عمرو بن شعيب، عن أبيه، عن

جده، عن سراقه بن مالك⁸² قال: (حضرت رسول الله ﷺ يقيد الأب من ابنه، ولا

يقيد الابن من أبيه)⁸³.

هؤلاء ضعفاء.

⁷⁷ سليمان بن حيان الكوفي، صدوق إمام، قال ابن معين: ليس بحجة، توفي سنة 189. انظر الكاشف للذهبي ترجمة 2080.

⁷⁸ قال الذهبي: "أحد الأعلام على لين فيه، وقال أحمد: كان من حفاظ الحديث، وقال أبو حاتم: صدوق يدلّس، فإذا قال حدثنا فهو صالح، وقال النسائي ليس بالقوي، مات سنة 145. انظر الكاشف للذهبي ترجمة 928. وقال ابن حجر: صدوق كثير الخطأ والتدليس. انظر تقريب التهذيب ترجمة 1119.

⁷⁹ عمر بن الخطاب العدوي، أبو حفص، ثاني الخلفاء الراشدين، استشهد في ذي الحجة سنة 23 وعمره 63 سنة. انظر الكاشف للذهبي ترجمة 4045.

⁸⁰ صحيح. أخرجه الترمذي في الديات باب ما جاء في الرجل يقتل ابنه يقاد منه أم لا ص 1793 برقم 1400.

⁸¹ قال أبو حاتم وغيره: لين الحديث، توفي سنة 149. انظر الكاشف للذهبي ترجمة 5280.

⁸² صحابي توفي سنة 24. انظر الكاشف للذهبي ترجمة 1807.

⁸³ ضعيف. أخرجه الترمذي في الديات باب ما جاء في الرجل يقتل ابنه يقاد منه أم لا ص 1793 برقم 1399.

[15] (ت) إسماعيل بن مسلم⁸⁴، عن عمرو بن دينار⁸⁵، عن طاووس⁸⁶، عن ابن عباس،

عن النبي ﷺ قال: (لا يقتل الوالد بالولد)⁸⁷.

إسماعيل واه.

[مسألة 4] يقتل الجماعة بالواحد

وعنه: لا يقتلون. كقول داود.

[16] يحيى بن سعيد الأنصاري⁸⁸، عن ابن المسيب⁸⁹: (أن إنسانا قتل بصنعاء، فقتل به

عمر سبعة، وقال: لو تمألاً⁹⁰ عليه أهل صنعاء لقتلتهم به)⁹¹.

⁸⁴ بصري ، جاور بمكة، ضعفه، وتركه النسائي. انظر الكاشف للذهبي ترجمة 408.

⁸⁵ أبو محمد المكي، الإمام، مات سنة 126 وعمره 80 سنة. انظر الكاشف للذهبي ترجمة 4152.

⁸⁶ طاووس بن كيسان أبو عبد الرحمن اليماني الإمام ، مات بمكة سنة 106. انظر الكاشف للذهبي ترجمة 2461.

⁸⁷ ضعيف. أخرجه الترمذي في الدييات باب ما جاء في الرجل يقتل ابنه يقاد منه أم لا ص1793 برقم 1401.

⁸⁸ حافظ فقيه حجة مات سنة 143. انظر الكاشف للذهبي ترجمة 6176.

⁸⁹ سعيد بن المسيب بن حزن أبو محمد المخزومي، سيد التابعين ، عاش 79 سنة ومات سنة 94. انظر الكاشف للذهبي

ترجمة 1960.

[مسألة 5] يجب القتل بالمثل إذا كان مما يقصد به القتل غالباً

وقال أبو حنيفة: لا يجب إلا فيما له حد⁹².

لنا:

[17] (خ، م) حديث قتادة، عن أنس⁹³: (أن يهودياً رضح⁹⁴ رأس امرأة بين حجرين،

فقتلها، فرضخ رسول الله ﷺ رأسه بين حجرين)⁹⁵.

⁹⁰ أي تساعدوا وتعاونوا واجتمعوا. "النهاية في غريب الحديث" 4/ 353 تأليف ابن الأثير مجد الدين المبارك بن محمد الجزري (ت606هـ) طبع دار الفكر بيروت 1979.

⁹¹ صحيح. رواه الدارقطني: 202/3، وابن أبي شيبة: 428/5.

⁹² المثل ما قابل المحدد وهو ما يقتل به الشخص بالرض أي: بكسر العظم، وتهشيم اللحم. والمحدد: ماله حد يجرح به. انظر شرح الخرشي محمد بن عبد الله (ت1101هـ) على مختصر خليل.

⁹³ أنس بن مالك صحابي مات سنة 93 وقد جاوز المائة. انظر الكاشف للذهبي ترجمة 477.

⁹⁴ الرضخ في اللغة له عدة معان، والمراد هنا: الدق والكسر. انظر "النهاية" لابن الأثير: 229/2.

⁹⁵ صحيح. أخرجه أحمد: 183/3، والبخاري في الخصومات باب ما يذكر في الإشخاص والخصومة بين المسلم واليهودي ص189 برقم 2413، ومسلم في الجنايات باب ثبوت القصاص في القتل بالحجر وغيره ص973 برقم 1672.

[18] ابن جريج⁹⁶، أنا عمرو بن دينار، أنه سمع طاووسا يخبر عن ابن عباس، عن عمر:

(أنه نشد قضاء رسول الله ﷺ في الجنين، فجاء حمل بن مالك، فقال: كنت بين

امراتين، فضربت إحداهما الأخرى بمسطح⁹⁷ فقتلتها، وجنينها، ف قضى رسول الله

ﷺ في جنينها بغرة⁹⁸، وأن تقتل بها⁹⁹.

واحتجوا:

[19] بشعبة، عن أيوب¹⁰⁰، عن القاسم بن ربيعة¹⁰¹، عن عبد الله بن عمرو أن رسول الله

ﷺ قال: (إن قتل الخطأ شبه العمد: قتل السوط والعصا، فيه مائة، منها أربعون

في بطونها أولادها)¹⁰².

⁹⁶ عبد الملك بن عبد العزيز بن جريج أبو الوليد المكي، أحد الفقهاء الأعلام توفي سنة 150 . انظر الكاشف للذهبي

ترجمة 3461.

⁹⁷ عمود الخيمة. انظر "النهاية" لابن الأثير 365/2.

⁹⁸ الغرة: عبد أو أمة كما جاء مبينا في أحاديث أخرى.

⁹⁹ صحيح. رواه أحمد: 364/1، وأبو داود: ص 1559، برقم 4572.

¹⁰⁰ أيوب بن أبي تميمة السختياني مات سنة 131 وله عمره 63 سنة. انظر الكاشف للذهبي ترجمة 511.

¹⁰¹ القاسم بن عبد الله بن ربيعة الغطفاني الجوشني. وثقوه . انظر الكاشف للذهبي ترجمة 4508.

هذا يرويه القاسم هذا مرة عن يعقوب بن أوس¹⁰³، وتارة عن عقبة بن أوس، عن

رجل له صحبة، وتارة يقول: عن ابن عمر.

ثم نحمله على العصا الصغيرة، وقد قرنهما بالسوط.

[20] إسحاق بن سنين¹⁰⁴، نا خالد بن مرداس¹⁰⁵، نا معلى بن هلال¹⁰⁶، عن أبي

إسحاق¹⁰⁷، عن عاصم بن ضمرة¹⁰⁸، عن علي قال رسول الله ﷺ: (لا قود في

النفس وغيرها إلا بمحديدة)¹⁰⁹.

¹⁰² ضعيف. رواه أحمد: 164/2، وأبو داود: ص 1557 برقم 4547.

¹⁰³ يعقوب بن أوس السدوسي من أهل البصرة. وقال ابن معين: عقبة بن أوس هو يعقوب بن أوس. وقال العجلي: بصري تابعي ثقة، وزعم خليفة بن خياط أن عقبة ويعقوب أخوان. انظر الثقات لابن حبان: 225/5.

¹⁰⁴ إسحاق بن إبراهيم بن سنين الحنلي، قال الحاكم: ليس بالقوي، وقال مرة: ضعيف. انظر المغني في الضعفاء للذهبي: 68/1.

¹⁰⁵ أبو الهيثم السراج، قال الخطيب: ثقة، توفي ببغداد سنة 231. انظر تاريخ بغداد: 307/8، والجرح والتعديل لابن أبي حاتم: 354/3، والثقات لابن حبان: 226/8.

¹⁰⁶ معلى بن هلال الكوفي الطحان، قال الذهبي: كذبه. انظر الكاشف ترجمة 5565.

¹⁰⁷ عمرو بن عبد الله السبيعي، عاش 95 سنة ومات سنة 127. انظر الكاشف للذهبي ترجمة 4185. وقال ابن حجر: ثقة اختلط بأخرة. التقريب ترجمة 5065.

وهذا¹¹⁰ فيه معنى؛ قال ابن معين: كان يضع الحديث، ثم لو صح لكان معناه: لا

قود يستوفى إلا بجديدة، وهي رواية لنا.

[21] نعيم بن حماد¹¹¹، نا بقية¹¹²، عن أبي معاذ¹¹³، عن الزهري¹¹⁴، عن ابن المسيب،

عن أبي هريرة مرفوعاً: (لا قود إلا بالسيف)¹¹⁵.

¹⁰⁸ وثقه علي بن المديني، وقال النسائي: ليس به بأس، ولينه ابن عدي، وقال الذهبي: وسط. مات سنة 74. انظر الكاشف للذهبي ترجمة 2504.

¹⁰⁹ ضعيف جداً. رواه الدارقطني 3: 87.

¹¹⁰ لوحة 151/ب.

¹¹¹ الخزازي أبو عبد الله المروزي، مختلف فيه، مات محبوساً بسامراء سنة 229. انظر الكاشف للذهبي ترجمة 5856.

¹¹² بقية بن الوليد الكلاعي وثقه الجمهور فيما سمعه من الثقات، وقال النسائي: إذا قال حدثنا وأخبرنا فهو ثقة، ملكت

سنة 197. انظر الكاشف للذهبي ترجمة 619.

¹¹³ سليمان بن أرقم البصري، متروك. انظر الكاشف للذهبي ترجمة 2068.

¹¹⁴ محمد بن مسلم بن عبيد الله بن عبد الله بن شهاب الزهري، أحد الأعلام، مات في رمضان سنة 124. انظر

الكاشف للذهبي ترجمة 5152.

¹¹⁵ ضعيف. رواه الدارقطني 3: 87.

[22] المسيب بن واضح¹¹⁶، نا بقية، عن أبي معاذ، عن عبد الكريم بن أبي المخارق¹¹⁷، عن

إبراهيم¹¹⁸، عن علقمة¹¹⁹، عن ابن مسعود¹²⁰، أن رسول الله ﷺ قال: (لا قود إلا

بسلاح)¹²¹.

رواهما الدارقطني، وأبو معاذ متروك.

[23] سليمان بن كثير¹²²، عن عمرو بن دينار، عن طاووس، عن ابن عباس قال رسول الله

ﷺ: (من قتل في عمياء¹²³، أو رميا بحجر، أو سوط، أو عصا، فعقله عقل

خطأ)¹²⁴.

¹¹⁶ أبو محمد السلمي، قال أبو حاتم: صدوق يخطئ كثيرا، وقال الدارقطني: ضعيف، مات آخر سنة 246، انظر سير

أعلام النبلاء للذهبي: 403/11-404.

¹¹⁷ أحد التابعين ضعفه أحمد وغيره. انظر الكاشف للذهبي ترجمة 3432.

¹¹⁸ إبراهيم بن يزيد النخعي، أبو عمران الكوفي الفقيه، مات سنة 96. انظر الكاشف للذهبي ترجمة 221.

¹¹⁹ علقمة بن قيس أبو شبل الفقيه، مات سنة 62. انظر الكاشف للذهبي ترجمة 3873.

¹²⁰ أبو عبد الرحمن الهذلي، من السابقين الأولين، مات بالمدينة سنة 32. انظر الكاشف للذهبي ترجمة 2979.

¹²¹ ضعيف. رواه الدارقطني 3: 88.

¹²² ضعفه ابن معين، وقال النسائي: ليس به بأس إلا في الزهري. انظر الكاشف للذهبي ترجمة 2124.

إسناده جيد، لكن هذا في الخطأ.

[24] الثوري¹²⁵، عن جابر، عن أبي عازب، عن النعمان بن بشير، عن النبي ﷺ قال: (كل

شيء خطأ إلا السيف، وفي كل خطأ أرش¹²⁶)¹²⁷.

جابر واه.

[25] ورواه ورقاء، عن جابر.

ففسر اسم أبي عازب فقال: عن مسلم بن أراك، عن النعمان. رواه الدارقطني.

[مسألة 6] إذا أمسك رجلا وقتله آخر حبس الممسك وقتل القاتل

¹²³ هي الضلالة والجهالة، والمراد بها هنا أن يوجد قتيل يعمى أمره ولا يتبين قاتله، وقد وردت بالفاظ أخرى مثل:

عميا، وعمية، ومعناها واحد. انظر "النهاية" لابن الأثير: 304/3-305.

¹²⁴ صحيح. رواه الدارقطني 94/3، وأبو داود: ص 1556 برقم 4540.

¹²⁵ سفيان بن سعيد أبو عبد الله، أحد الأعلام، توفي سنة 161 وعمره 64 سنة. انظر الكاشف للذهبي ترجمة 1996.

¹²⁶ أرض الجناية دينها. انظر "معجم مقاييس اللغة" 79/1، و"المطلع" ص 237.

¹²⁷ ضعيف. رواه الدارقطني: 106/3، وأحمد: 275/4.

وعنه: يقتلان. كقول مالك.

[26] أبو داود الحفري¹²⁸، عن سفيان¹²⁹، عن إسماعيل بن أمية¹³⁰، عن نافع¹³¹، عن ابن

عمر مرفوعا: (إذا أمسك الرجل الرجل وقتله آخر يقتل القاتل، ويحبس الذي

أمسك).

رواه الدارقطني¹³².

قلت: وهو حديث منكر، لعله من قول ابن عمر.

[مسألة 7] لولي الدم أن يعفو عن القود إلى الدية من غير رضا الجاني

وقال أبو حنيفة: ليس له ذلك إلا برضا الجاني.

¹²⁸ اسمه: عمر بن سعد بن عبيد، ثقة عابد توفي سنة 203هـ. انظر "التقريب" ص 719.

¹²⁹ هو الثوري، تقدم ذكره في الحديث 24.

¹³⁰ الأموي، ثقة، مات سنة 139. انظر الكاشف للذهبي ترجمة 358.

¹³¹ الفقيه أبو عبد الله، مولى ابن عمر، من أئمة التابعين، مات سنة 117. انظر الكاشف للذهبي ترجمة 5791.

¹³² في السنن: 103/3، والبيهقي 50/8.

[27] ابن إسحاق ، حدثني المقبري¹³³ ، عن أبي شريح الخزاعي¹³⁴ : (أن رسول الله ﷺ قال

يوم الفتح: من قتل بعد مقامي هذا فأهله بخير النظرين، إن شاءوا قدم قاتله، وإن

شاءوا فعقله). رواه أحمد¹³⁵.

[28] محمد بن سلمة الحراني¹³⁶ ، عن محمد بن إسحاق، عن الحارث بن الفضل¹³⁷ ، عن

سفيان بن أبي العوجاء¹³⁸ ، عن أبي شريح قال: سمعت رسول الله ﷺ يقول: (من

أصيب بدم أو خبل¹³⁹ —والخبل عرج— فهو بالخيار بين إحدى ثلاث، فإن أراد

¹³³ هو كيسان أبو سعيد المدني، مولى أم شريك، ثقة ثبت، مات سنة مائة. انظر "التقريب" لابن حجر ص 814.

¹³⁴ صحابي مختلف في اسمه، مات سنة 68. انظر الكاشف للذهبي ترجمة 6674، والتقريب لابن حجر ترجمة 8158.

¹³⁵ صحيح. رواه أحمد في المسند: 31/4، والدارقطني: 96/3.

¹³⁶ قال ابن سعد: ثقة عالم له فضل ورواية وفتوى، مات سنة 192. انظر الكاشف للذهبي ترجمة 4880.

¹³⁷ كذا ورد في المخطوط "الفضل"، أما في الكاشف ترجمة 2001، والتقريب ترجمة 1042، وتهذيب التهذيب:

359/2، والتاريخ الكبير للبخاري: 88/4 فقد ورد بالتضغير "فضيل" وهو ثقة.

¹³⁸ ضعيف ، أخرج له أبو داود وابن ماجه. انظر الكاشف للذهبي ترجمة 2001.

¹³⁹ أي من أصيب بقتل نفس أو قطع عضو كيد أو رجل. انظر "النهاية" لابن الأثير: 8/2.

الرابعة فخذوا على يديه، بين أن يقتص¹⁴⁰ أو يعفو، أو يأخذ العقل، فإن قبل شيئا

من ذلك، ثم عدا بعد ذلك فله النار خالدا فيها مخلدا¹⁴¹.

[مسألة 8] الواجب بالعمد القصاص أو الدية

وعنه: الواجب القود فحسب. كقول أبي حنيفة، ومالك.

وعن الشافعي كالروائتين.

فائدة الخلاف: إذا عفا مطلقا ثبتت الدية على الرواية الأولى.

ولنا: حديث أبي شريح.

[29] وحديث (خ، م) أبي سلمة¹⁴²، عن أبي هريرة، عن النبي ﷺ قال: (من قتل له قتيلا

فهو بخير النظرين، إما أن يفدى، وإما أن يقتل¹⁴³)¹⁴⁴.

¹⁴⁰ لوحة 152/أ.

¹⁴¹ هذه رواية أخرى للحديث رقم 27 المتقدم.

[30] محمد بن راشد، نا سليمان بن موسى، عن عمرو بن شعيب، عن أبيه، عن جده، أن

النبي ﷺ قال: (من قتل متعمدا دفع إلى أولياء المقتول، فإن شاءوا قتلوه، وإن شاءوا

أخذوا الدية)¹⁴⁵.

[مسألة 9] يجري القصاص في كسر السن كما يجري في قلعه

خلافًا للشافعية.

لنا: حديث

¹⁴² أبو سلمة بن عبد الرحمن بن عوف الزهري، ثقة، اختلف في سنة وفاته. انظر الكاشف للذهبي ترجمة 6661،

والتهذيب لابن حجر 531/4-532.

¹⁴³ كذا ضبطها الذهبي في الأصل.

¹⁴⁴ صحيح. رواه أحمد: 385/3، والبخاري في اللقطة باب كيف تعرف لقطة أهل مكة ص 191 برقم 2434،

ومسلم في الحج باب تحريم مكة وتحريم صيدها ص 904 برقم 1355.

¹⁴⁵ صحيح. رواه أحمد 183/2.

[31] (د، خ) حميد¹⁴⁶ ، عن أنس: (أن الربيع بنت النضر عمته لظمت جارية،

فكسرت سننها، فعرضوا عليهم الأرش فأبوا، فطلبوا العفو فأبوا، فأتوا النبي ﷺ،

فأمرهم بالقصاص، فجاء أخوها أنس بن النضر، فقال: يا رسول الله، أيكسر سن

الربيع؟ والذي بعثك بالحق لا يكسر سننها. فقال: يا أنس، كتاب الله القصاص.

فعفى القوم، فقال رسول الله ﷺ: إن من عباد الله من لو أقسم على الله لأبره)¹⁴⁷.

[32] (س) أبو خالد الأحمر، نا حميد ، عن أنس: (أن رسول الله ﷺ قضى بالقصاص في

السن)¹⁴⁸.

[مسألة 10] لا يقتص من الجناية إلا بعد الاندمال

¹⁴⁶ حميد بن أبي حميد الطويل، أبو عبيدة البصري، ثقة مدلس، مات سنة 142. انظر التقريب لابن حجر ترجمة

1544، والكاشف للذهبي ترجمة 1248.

¹⁴⁷ صحيح. أخرجه البخاري في تفسير سورة البقرة باب (يا أيها الذين آمنوا كتب عليكم القصاص) ص 369 برقم

4500.

¹⁴⁸ صحيح. رواه النسائي في القسامة باب القصاص في السن ص 2395-2396 برقم 4756.

وقال الشافعي: يقتص في الحال.

[33] يعقوب بن كاسب¹⁴⁹، نا عبد الله بن عبد الله الأموي¹⁵⁰، عن ابن جريج وغيره، عن

أبي الزبير¹⁵¹، عن جابر¹⁵²: (أن رجلاً جرح، فأراد أن يستقيد، فنهى رسول الله

أن يستقاد من الجراح حتى يبرأ المجروح). رواه الدارقطني¹⁵³.

قلت: هذا من مناكير يعقوب.

[مسألة 11] فإن اقتص قبل الاندمال فسرت¹⁵⁴ الجناية إلى موضع آخر فلا ضمان

على الجاني

¹⁴⁹ هو يعقوب بن حميد بن كاسب المدني، قال أبو حاتم: ضعيف، وقال غيره: صاحب مناكير، وقال البخاري: لم نر إلا خيراً هو في الأصل صدوق. مات سنة 241. انظر الكاشف للذهبي ترجمة 6387.

¹⁵⁰ قال ابن حبان: يخالف في روايته، وقال العقيلي: لا يتابع عليه. انظر تهذيب التهذيب لابن حجر: 370/2.

¹⁵¹ محمد بن مسلم بن تدرس المكي، حافظ ثقة، وقال أبو حاتم: لا يحتج به. توفي سنة 128، وكان مدلساً واسع العلم. الكاشف للذهبي ترجمة 5149.

¹⁵² جابر بن عبد الله السلمي، صحابي من أهل بيعة العقبة، مات سنة 78. انظر الكاشف للذهبي ترجمة 733.

¹⁵³ ضعيف. رواه الدارقطني 88/3، والبيهقي 66/8.

¹⁵⁴ أي تعدى مرضها وفسادها إلى موضع آخر. انظر "المطلع" ص 360.

خلافًا لأكثرهم.

[34] القواريري¹⁵⁵، نا محمد بن حمران¹⁵⁶، عن ابن جريج، عن عمرو بن شعيب، عن

أبيه، عن جده¹⁵⁷: (أن رجلاً طعن رجلاً بقرن في ركبته، فجاء إلى النبي ﷺ فقلل:

أقدي. قال: حتى تبرأ، ثم جاء إليه فقال: أقدي، فأقاده، ثم جاء فقال: يا رسول

الله، عرجت. قال: قد نهيتك فعصيتني، فأبعدك¹⁵⁸ الله، وبطل¹⁵⁹ عرجك، ثم نهى

رسول الله ﷺ أن يقتص من جرح حتى يبرأ صاحبه¹⁶⁰.

[مسألة 12] لا قود إلا بالسيف

وعنه: يقتل بمثل الآلة التي قتل بها. وهو قول مالك، والشافعي.

¹⁵⁵ عبيد الله بن عمر القواريري، أبو سعيد البصري الحافظ، مات سنة 235. انظر الكاشف للذهبي ترجمة 3577.

¹⁵⁶ محمد بن حمران القيسي، قال النسائي: ليس بالقوي. انظر الكاشف للذهبي ترجمة 4807.

¹⁵⁷ لوحة 152/ب.

¹⁵⁸ البعد ضد القرب، والبعد أيضا الهلاك، يقال: بعدا له أي هلكا له. انظر "معجم مقاييس اللغة": 268/1،

و"النهاية" لابن الأثير: 139/1-140.

¹⁵⁹ أي صار هذرا. انظر "معجم مقاييس اللغة" لابن فارس: 258/1-259.

لنا حديث:

ابن مسعود، وأبي هريرة، عن النبي ﷺ: (لا قود إلا بالسيف).

وقد مضيا¹⁶¹.

فذكروا:

[35] ما روي عن النبي ﷺ قال: (من غرق غرقناه، ومن حرق حرقناه)¹⁶².

وهذا ليس يصح، بل قاله زياد في خطبته.

[مسألة 13] قتل عمد الخطأ لا يوجب القود

وهو: ما وجد فيه عمد في الفعل، وخطأ في القصد.

¹⁶⁰ ضعيف. رواه الدارقطني: 90-89/3، وأحمد: 217/2.

¹⁶¹ راجع الحديثين: 21، 22.

¹⁶² ضعيف. رواه البيهقي: 43/8.

وقال مالك: قتل عمد الخطأ محال، وفيه القود.

[36] سليمان بن موسى، عن عمرو بن شعيب، عن أبيه، عن جده أن النبي ﷺ قال: (عقل

شبه العمد مغلظ مثل عقل العمد، ولا يقتل صاحبه، وذلك أن ينزو الشيطان بين

الناس، فيكون رميا في عمياء، في غير فتنة، ولا سلاح)¹⁶³.

ومر حديث القاسم بن ربيعة، عن عبد الله بن عمرو أن رسول الله ﷺ قال: (إن

قتل الخطأ شبه العمد، قتيل السوط والعصا فيه مائة منها أربعون في بطونها

أولادها)¹⁶⁴.

[مسألة 14] دية الخطأ أخماس: عشرون جذعة ومثلها حقة ومثلها بنت لبون ومثلها

بنت مخاض ومثلها ابن مخاض

¹⁶³ حسن. أخرجه أحمد 2/183، وأبو داود: ص 1558 برقم 4565.

¹⁶⁴ راجع حديث 19.

وقال مالك والشافعي: بل ابن لبون.

[37] حجاج بن أرطاة، عن زيد بن جبير¹⁶⁵، عن خشف بن مالك¹⁶⁶، عن ابن مسعود:

(قضى رسول الله ﷺ في دية الخطأ عشرين بنت مخاض¹⁶⁷، وعشرين بني مخاض

ذكور، وعشرين ابنة لبون¹⁶⁸، وعشرين حقة¹⁶⁹، وعشرين جذعة¹⁷⁰)¹⁷¹.

ولهم حديث:

[38] حماد بن سلمة¹⁷²، أنا سليمان التيمي¹⁷³، عن أبي مجلز¹⁷⁴، عن أبي عبيدة¹⁷⁵، أن

ابن مسعود قال: (دية الخطأ خمسة أخماس: عشرون حقة، وعشرون جذعة،

وعشرون بنت مخاض، وعشرون بنت لبون، وعشرون بنو لبون ذكور)¹⁷⁶.

¹⁶⁵ زيد بن جبير الطائي، ثقة، له ستة أحاديث. انظر الكاشف للذهبي ترجمة 1726.

¹⁶⁶ الطائي، قال النسائي ثقة، وذكره ابن حبان في الثقات. انظر تهذيب التهذيب لابن حجر: 542/1.

¹⁶⁷ أي بنت ناقة ذات مخاض، والمخاض الولادة، والمراد ما أتمت سنة ودخلت في الثانية. انظر "المطلع" ص 123.

¹⁶⁸ هي التي استكملت سنتين ودخلت في الثالثة. انظر "المطلع" ص 124.

¹⁶⁹ هي التي استكملت ثلاث سنين، سميت بذلك لأنها استحققت أن تركب ويحمل عليها. "المطلع" ص 124.

¹⁷⁰ هي التي استكملت أربع سنين ودخلت في الخامسة. انظر "المطلع" ص 124.

¹⁷¹ ضعيف. أخرجه أحمد 450/1.

قال الدارقطني: رواه ثقات، وحديث خشف غير ثابت¹⁷⁷ لجهالة خشف،

وحجاج مدلس، ثم قد اختلف الرواة فيه على حجاج.

قال المؤلف¹⁷⁸: يعارض هذا أن أبا عبيدة لم يسمع من أبيه، ثم إنما حكى عنه

فتواه.

قال: ومتى كان الإنسان ثقة فينبغي أن يقبل قوله، وكيف يقال عن الثقة:

مجهول؟! واشتراط المحدثين أن يروي عنه اثنان لا وجه له.

قلت: فمن وثق هذا¹⁷⁹؟! فدع الهوى والخبط¹⁸⁰.

¹⁷² قال الذهبي: ثقة صدوق يغلط، وليس في قوة مالك. توفي سنة 167. انظر الكاشف للذهبي ترجمة 1220.

¹⁷³ هو سليمان بن طرخان أو المعتمر التيمي، توفي سنة 143، وثقه أحمد وابن معين والنسائي. انظر تهذيب التهذيب

لابن حجر: 99/2.

¹⁷⁴ هو لاحق بن حميد السدوسي البصري، مشهور بكنيته، ثقة، مات سنة 106. انظر "التقريب" ص 1046.

¹⁷⁵ عامر بن عبد الله بن مسعود، مات سنة 82. انظر الكاشف للذهبي ترجمة 2539. وقال ابن حجر: ذكره ابن

حبان في الثقات وقال: لم يسمع من أبيه شيئا. انظر تهذيب التهذيب لابن حجر: 269/2.

¹⁷⁶ موقوف. رواه الدارقطني 172/3.

¹⁷⁷ لوجه 153/أ.

[مسألة 15] الدراهم والدنانير أصل مقدر في الدية يجوز أخذها مع القدرة على الإبل.

وقال الشافعي: الأصل الإبل، فإن عدمت عدل إلى ألف دينار، أو اثني عشر ألف

[درهم]¹⁸¹.

وعنه: يعدل إلى قيمة الإبل.

[39] (ت) محمد بن مسلم الطائفي¹⁸²، عن عمرو بن دينار، عن عكرمة¹⁸³، عن ابن

عباس، عن النبي ﷺ: (أنه جعل الدية اثني عشر ألفاً)¹⁸⁴.

¹⁷⁸ أي ابن الجوزي.

¹⁷⁹ أي: من وثق خشف بن مالك. قلت: وثقه النسائي كما ذكر الذهبي نفسه في الميزان: 176/2، وانظر "تهذيب التهذيب" لابن حجر: 542/1، و"التقريب": ص 297.

¹⁸⁰ الخبط ضرب الشجر بالعصا ليسقط الورق منه، وتخبطه الشيطان إذا تلعب به، ويقال: "خبط عشوات" أي يخط في الظلام، وهو الذي يمشي في الليل بلا مصباح فيتحير ويضل، وفلان يخط في عمياء إذا ركب أمراً بجهالة. انظر "النهاية" لابن الأثير: 7/2-8.

¹⁸¹ ليست في الأصل، وهي في "التحقيق" لابن الجوزي: 301/2.

¹⁸² قال الذهبي: فيه لين، وقد وثق، وله في مسلم حديث واحد، مات سنة 177. انظر الكاشف للذهبي ترجمة 5151.

¹⁸³ مولى ابن عباس، ثبت، لكنه إباحي، يرى السيف، روى له مسلم مقروناً، وتحايده مالك، مات سنة 106. انظر الكاشف للذهبي ترجمة 3867.

قيل: فرواه ابن عيينة، عن عمرو. فأسقط ابن عباس.

ثم الطائفي قد ضعفه أحمد.

قلنا: وقد وثقه يحيى، والرفع¹⁸⁵ زيادة.

[40] الدارقطني، نا ابن صاعد¹⁸⁶، نا محمد بن ميمون الخياط¹⁸⁷، نا سفيان، عن عمرو،

عن عكرمة، عن ابن عباس: (أن النبي ﷺ قضى باثني عشر ألفاً في الدية).

قال الخياط: إنما قال¹⁸⁸ عن ابن عباس مرة، وأكثر ذلك كان يرسله.

¹⁸⁴ ضعيف. رواه الترمذي في الديات باب ما جاء في الدية كم هي من الدراهم ص 1792 برقم 1388.

¹⁸⁵ في هامش الأصل: "صوابه : والوصل".

¹⁸⁶ يحيى بن محمد بن صاعد، قال الدارقطني: ثقة ثبت، مات سنة 318. انظر سير أعلام النبلاء للذهبي: 501/14.

¹⁸⁷ توفي سنة 252، قال النسائي: ليس بالقوي، وذكره ابن حبان في الثقات وقال ربما وهم. انظر تهذيب التهذيب

لابن حجر: 715/3.

¹⁸⁸ يعني: سفيان ابن عيينة شيخه.

[مسألة 16] والبقر والغنم والحلل أصل في الدية أيضا مقدرة بمائتي بقرة وألفي شاة

ومائتي حلة

وهو قول أبي يوسف ومحمد. خلافا للأكثر.

[41] (د) ¹⁸⁹ ابن إسحاق قال: ذكر عطاء ¹⁹⁰ ، عن جابر قال: (فرض رسول الله ﷺ في

الدية على أهل الإبل مائة، وعلى أهل البقر مائتين، وعلى أهل الشاء ألفي شاة،

وعلى أهل الحلل مائتي حلة ¹⁹¹).

[مسألة 17] في أشراف ¹⁹² الأذنين الدية

وقال مالك: فيها حكومة ¹⁹³.

¹⁸⁹ في الديات باب الدية كم هي ص 1556 - 1557 برقم 4544.

¹⁹⁰ عطاء بن أبي رباح أبو محمد المكي، عاش ثمانين سنة ومات سنة 114 أو 115. انظر الكاشف للذهبي ترجمة 3797.

¹⁹¹ الحلة من ثياب اليمن، وهي ثوبان من جنس واحد. انظر "النهاية" لابن الأثير: 432/1.

¹⁹² هو الجلد القائم بين العذار والبياض الذي حولها. انظر "الإفصاح عن معاني الصحاح" لابن هبيرة يحيى بن محمد الحنبلي (ت 560) 206/2 طبع المؤسسة السعيدية بالرياض 1980.

[42] يونس¹⁹⁴، عن ابن شهاب قال: (قرأت في كتاب رسول الله ﷺ لعمر بن حزم

حين بعثه إلى نجران، وكان الكتاب عند أبي بكر بن حزم، فكتب رسول الله ﷺ

فيه: في النفس مائة من الإبل، وفي الأنف إذا أوعي¹⁹⁵ جدعه مائة من الإبل، وفي

العين خمسون من الإبل، وفي الأذن خمسون).

وفي "لسان العرب" 170/9: أشراف الإنسان أذناه وأنفه. وقال: أذن شرفاء أي طويلة. 171/9.

¹⁹³ الحكومة هنا معناها أن يقوم المجني عليه كأنه عبد لا جناية به، ثم يقوم وهي به قد برئت، فما نقص من القيمة فله مثله من الدية، مثاله: كأن تكون قيمته وهو عبد صحيح عشرة، وقيمتة وهو عبد به الجناية تسعة فيكون فيه عشر ديته. انظر "الدر النقي في شرح ألفاظ الخرقى" 736/7. تأليف يوسف بن حسن بن عبد الهادي المعروف بابن المسبرد (ت 909) طبع دار المجتمع بمكة 1991.

¹⁹⁴ يونس بن أبي إسحاق السبيعي، صدوق، وثقه ابن معين، وقال أحمد: حديثه مضطرب، وقال أبو حاتم: لا يحتج به. مات سنة 159. انظر الكاشف للذهبي ترجمة 6463.

¹⁹⁵ أوعي واستوعي بمعنى أوعب واستوعب، ومعناها استكمل واستوفى. انظر "غريب الحديث" لابن الجوزي: 475/2.

[مسألة 18] في العين القائمة¹⁹⁶، واليد الشلاء، واللسان الأخرس، والذكر الأشل،

والأصبع¹⁹⁷ الزائدة ثلث دية العضو

وعنه: فيها حكومة. كقول أكثرهم.

[43] (س) الهيثم بن حميد¹⁹⁸، أنا العلاء بن الحارث¹⁹⁹، عن عمرو بن شعيب، عن أبيه،

عن جده: (أن رسول الله ﷺ قضى في العين العوراء السادة لمكانها إذا طمست

بثلث ديتها، وفي اليد الشلاء إذا قطعت بثلث ديتها، وفي السن السوداء إذا

نزعت بثلث ديتها)²⁰⁰.

¹⁹⁶ العين القائمة هي الباقية في موضعها صحيحة، وإنما ذهب نظرها وإبصارها. "المطلع" ص362.

¹⁹⁷ لوحة 153/ب.

¹⁹⁸ الغساني، قال أبو داود: ثقة قدرى. انظر الكاشف للذهبي ترجمة 6016.

¹⁹⁹ الحضرمي الدمشقي، الفقيه، قال أبو داود: ثقة تغير عقله، مات سنة 136. انظر الكاشف للذهبي ترجمة 4324.

²⁰⁰ أخرجه النسائي في القسامة باب العين العوراء السادة لمكانها إذا طمست ص2401 برقم 4844.

[44] أبو هلال²⁰¹، نا عبد الله بن بريدة²⁰²، عن يحيى بن يعمر²⁰³، عن ابن عباس أنه قال:

(في اليد الشلاء ثلث الدية، وفي العين القائمة إذا خسفت ثلث الدية). رواه

الدارقطني²⁰⁴.

[مسألة 19] في موضحة الوجه خمس من الإبل

وقال مالك: في موضحة²⁰⁵ الأنف، واللحي²⁰⁶ الأسفل حكومة.

[45] (ت) يزيد بن زريع²⁰⁷، نا حسين المعلم²⁰⁸، عن عمرو بن شعيب، عن أبيه، عن

جده، أن النبي ﷺ قال: (في المواضع خمس خمس)²⁰⁹.

²⁰¹ محمد بن سليم، وثقه أبو داود، وقال ابن معين: صدوق، وقال النسائي: ليس بالقوي، مات سنة 167. انظر

الكاشف للذهبي ترجمة 4881.

²⁰² قاضي مرو، ثقة، ولد عام البرموك، وعاش مائة سنة، وتوفي سنة 115. انظر الكاشف للذهبي ترجمة 2664.

²⁰³ قال الذهبي: ثقة، مقري، مفوه. انظر الكاشف ترجمة 6273.

²⁰⁴ في السنن: 214/3.

²⁰⁵ الموضحة التي تبدي وضح العظم أي بياضه، والجمع: مواضع. "المطلع" ص 367، و "معجم مقاييس اللغة":

119/6.

²⁰⁶ هو العظم الذي تثبت عليه اللحية من الإنسان وغيره، وجمعه: ألح. انظر "معجم مقاييس اللغة": 240/5.

[مسألة 20] إذا ضربت حامل فماتت ثم انفصل منها جنين ميت وجبت فيه الغرة

وقال أبو حنيفة ومالك: لا شيء فيه.

[46] (خ، م) هشام بن عروة²¹⁰، عن أبيه²¹¹، عن المغيرة²¹²: (أن عمر استشارهم في

إملاص²¹³ المرأة؟ فقال المغيرة: قضى النبي ﷺ بالغرة عبد أو أمة. فشهد محمد بن

مسلمة أنه شهد النبي ﷺ قضى به²¹⁴.

²⁰⁷ البصري، الحافظ، قال أحمد: إليه المنتهى في التثبت بالبصرة، عاش 81 سنة ومات سنة 182 في شوال. انظر الكاشف للذهبي ترجمة 6301.

²⁰⁸ هو الحسين بن ذكوان المعلم البصري، ثقة. انظر الكاشف للذهبي ترجمة 1087.

²⁰⁹ رواه الترمذي في الدييات باب ما جاء في الموضحة ص 1792 برقم 1390.

²¹⁰ أبو المنذر القرشي، قال أبو حاتم: ثقة إمام في الحديث، توفي سنة 146. انظر الكاشف للذهبي ترجمة 5972.

²¹¹ عروة بن الزبير أبو عبد الله، قال ابن سعد: كان فقيها عالما كثير الحديث ثبتا مأمونا، وقال هشام: صام أبي الدهر، ومات وهو صائم، اختلف في سنة وفاته. انظر الكاشف للذهبي ترجمة 3775.

²¹² المغيرة بن شعبة الثقفي، ولي الكوفة غير مرة، وبرأيه ودهائه يضرب المثل، مات سنة 50. انظر الكاشف للذهبي ترجمة 5592.

²¹³ الملص والإملاص إفلات الشيء، وهو هنا إسقاط المرأة جنينها. انظر "معجم مقاييس اللغة": 350/5.

²¹⁴ أخرجه البخاري في الدييات باب جنين المرأة ص 576 برقم 6905، 6906، ومسلم في القسامة باب دية الجنين .. ص 976 برقم 1683.

[47] (م) منصور²¹⁵، عن إبراهيم، عن عبيد بن نضيلة²¹⁶، عن المغيرة: (أن امرأة ضربتها

ضرتها بعمود فسطاط²¹⁷، فقتلتها وهي حبلى، فأتي فيها النبي ﷺ، فقضى فيها

على عصبة²¹⁸ القاتلة بالدية، وفي الجنين بغرة، فقال عصبتها: أندي من لا أكل

ولا شرب، ولاش صاح فاستهل، ومثل ذلك يطل²¹⁹. فقال : سجع كسجع

الأعراب²²⁰.

القسامة²²¹

[مسألة 21] يبدأ في القسامة بأيمان المدعين

²¹⁵ منصور بن المعتمر أبو عتاب السلمي، من أئمة الكوفة، مات سنة 132. انظر الكاشف للذهبي ترجمة 5647.

²¹⁶ وكذلك هو في "تهذيب الكمال" للمزي: 896/2، و"تهذيب التهذيب" لابن حجر: 41/3. وفي "التقريب"

ص652: نضلة. وهو الخزاعي الكوفي المقرئ، وثقه النسائي، مات سنة 74. انظر الكاشف للذهبي ترجمة 3634.

²¹⁷ الفسطاط بيت من شعر. "لسان العرب" مادة (فسط) 370/7.

²¹⁸ العصبة: الأقارب من جهة الأب؛ لأنهم يعصبونه ويعتصب بهم أي يحيطون به ويشتد بهم. "النهاية" لابن الأثير:

245/3.

²¹⁹ أي يهدر فلا قيمة له. انظر "النهاية" لابن الأثير: 136/3.

وقال أبو حنيفة: بأيمان المدعى عليهم.

[48] (خ، م) الليث²²²، عن يحيى بن سعيد، عن بشير بن يسار²²³، عن سهل بن أبي

حثة²²⁴ قال: (خرج عبد الله بن سهل، ومحيفة بن مسعود حتى إذا²²⁵ كانا

بخيبر تفرقا في بعض ما هنالك، فإذا محيفة يجد عبد الله بن سهل قتيلا، فدفنه،

ثم أقبل إلى رسول الله ﷺ هو وحويصة بن مسعود، وعبد الرحمن بن سهل، وكان

أصغر القوم، فذهب ليتكلم قبل صاحبيه، فقال رسول الله ﷺ: كبر. فصمت،

وتكلم صاحباه، وتكلم معهما فذكروا مقتل عبد الله بن سهل، فقال لهم: أتحلفون

²²⁰ أخرجه مسلم في القسامة باب دية الجنين ص 975 برقم 1682.

²²¹ أيمان تقسم على أولياء المقتول إذا ادعوا دم مقتولهم على ناس اقموهم به. "معجم مقاييس اللغة": 86/5.

²²² أبو الحارث الليث بن سعد الإمام، ثبت، من نظراء مالك، عاش 81 سنة ومات سنة 175 في شعبان. انظر

الكاشف للذهبي ترجمة 4691.

²²³ قال ابن معين والنسائي: ثقة، وقال ابن سعد: كان شيخا كبيرا فقيها أدرك عامة الصحابة. انظر تهذيب التهذيب

لابن حجر: 238/1.

خمسين يمينا، فتستحقون صاحبكم أو قاتلكم؟ قالوا: وكيف نحلف ، ولم نشهد؟

قال: فتبرئكم يهود بخمسين يمينا. قالوا: وكيف نقبل أيمان قوم كفار؟ فلما رأى

ذلك رسول الله ﷺ أعطى عقله²²⁶.

قالوا: ففي الصحيح غير هذا.

[49] (خ) نا أبو نعيم²²⁷ ، نا سعيد بن عبيد²²⁸ ، عن بشير بن يسار: (زعم أن رجلا من

الأنصار يقال له: سهل بن أبي حثمة أخبره أن نفرا من قومه انطلقوا إلى خيبر،

فتفرقوا فيها، ووجدوا أحدهم قتيلا، فانطلقوا ، فأخبروا رسول الله ﷺ، فقال لهم:

²²⁴ قال أبو حاتم: بايع تحت الشجرة، وشهد المشاهد كلها إلا بدرا، وقال الواقدي: مات النبي وعمره 8 سنين. انظر

تهذيب التهذيب لابن حجر: 122/2.

²²⁵ لوحة 154/أ.

²²⁶ أخرجه مسلم في القسامة باب القسامة ص 971 برقم 1669، وأخرجه البخاري في الجزية والموادعة باب الموادعة

والمصالحة مع المشركين ص 257 برقم 2173.

²²⁷ الفضل بن دكين الملائني، قال النسائي: ثقة مأمون، مات سنة 219. انظر تهذيب التهذيب لابن حجر: 387/3.

²²⁸ أبو الهذيل الطائي، ثقة. انظر الكاشف للذهبي ترجمة 1929.

تأتون بالبينة على قتله. قالوا: ما لنا ببينة. قال: فيحلفون. قالوا: لا نرضى بأيمان

اليهود. فكره رسول الله ﷺ أن يبطل²²⁹ دمه، فوداه بمائة من إبل الصدقة²³⁰.

قلنا: هذا يرويه سعيد بن عبيد، وروايتنا أكثر، وأولى، وأكمل لفظاً؛ فليس في

حديثكم إلا عرض اليمين على المدعى عليهم، وذلك في حديثنا أيضاً، لكن بعد عرضها

على المدعى، فتضمنت روايتنا زيادة، ويقويها قوله عليه السلام:

[50] (البينة على من ادعى، واليمين على من أنكر، إلا في القسامة)²³¹.

وسياقي سنده في الأيمان.

[مسألة 22] الذمي إذا انتقل إلى دين لم يقبل منه سوى الإسلام

وقال أبو حنيفة: يقر.

²²⁹ لفظ البخاري " يبطل ". وهي بمعناها.

²³⁰ رواه البخاري في الديات باب القسامة ص 575 برقم 6898.

²³¹ ضعيف. رواه الدارقطني: 110/3 وفي إسناده مسلم بن خالد الزنجي، وانظر التلخيص الحبير لابن حجر: 208/4.

وعن الشافعي قولان.

[51] أيوب ، عن عكرمة، عن ابن عباس قال رسول الله ﷺ: (من بدل دينه فاقتلوه)²³².

[مسألة 23] لا يجوز اتباع المنهزم من البغاة²³³ ولا يجاز²³⁴ على جريحهم

وقال أبو حنيفة: إن كان لهم فئة جاز ذلك.

[52] عبد العزيز الدراوردي²³⁵، عن جعفر بن محمد²³⁶، عن أبيه²³⁷، عن علي بن حسين،

عن مروان بن الحكم قال: (صرخ صارخ لعل يوم الجمل: لا يقتلن مدبر، ولا

يذفف²³⁸ على جريح، ومن أغلق بابه فهو آمن، ومن طرح السلاح فهو آمن)²³⁹.

²³² صحيح. رواه أحمد: 217/1، والبخاري: برقم 6922 ص 577.

²³³ لوحة 154/ب.

²³⁴ أي ولا يقتل. انظر "المطلع" ص 377.

²³⁵ قال أبو زرعة: سبى الحفظ ، مات سنة 187. انظر الكاشف للذهبي ترجمة 3407.

²³⁶ جعفر بن محمد بن علي بن الحسين بن علي بن أبي طالب، ثقة ، متفق على جلالة قدره، مات سنة 148. انظر

تهذيب التهذيب لابن حجر: 310/1-311.

²³⁷ قال ابن سعد: كان ثقة كثير الحديث ، مات سنة 14. انظر تهذيب التهذيب لابن حجر: 650/3-651.

²³⁸ أي لا يجهز بمعنى لا يقتل. انظر "غريب الحديث" للخطابي: 269/2.

²³⁹ موقوف. أخرجه سعيد بن منصور في سننه: 237/2. وأخرجه عبد الرزاق في المصنف: 123/10، والبيهقي في السنن الكبرى: 181/8 من طريق جعفر بن محمد، عن أبيه، عن علي. وهذا إسناد منقطع، فمحمد الباقر لم يلق جد أبيه علي بن أبي طالب.

الحدود

[مسألة 24] يجمع الجلد والرجم على من أحسن

وقال بذلك داود.

وعن أحمد: لا يجتمعان. كقول أكثرهم.

[53] (م) ابن أبي عروبة، عن قتادة، عن الحسن، عن حطان بن عبد الله الرقاشي¹، عن

عبادة بن الصامت² قال: (كان رسول الله ﷺ إذا نزل عليه الوحي كرب³ لذلك،

وترب⁴ وجهه، فأنزل الله عليه ذات يوم، فلما سري عنه⁵ قال: خذوا عني، قد

جعل الله لهن سيلا، الشيب بالثيب، والبكر بالبكر، الشيب جلد مائة، ورجم

بالحجارة، والبكر جلد مائة، ثم نفي سنة⁶).

¹ ثقة، روى له مسلم وأصحاب السنن الأربعة. انظر الكاشف للذهبي ترجمة 1142.

² أبو الوليد الخزرجي، من بني عوف، بدري نقيب، أحد من جمع القرآن، ومات بالرملة سنة 34 وله 72 عاما. انظر الكاشف للذهبي ترجمة 2584.

³ هو الغم الشديد. معجم مقاييس اللغة: 174/5.

⁴ أي تغير لون وجهه. انظر معجم مقاييس اللغة: 475/2.

⁵ أي انكشف همه. انظر لسان العرب: 380/14.

⁶ صحيح. رواه أحمد 318/5، ومسلم في الحدود باب حد الزنى ص 977 برقم 1690.

[54] أحمد : نا وكيع⁷ ، نا الفضل بن دلهم⁸ ، عن الحسن ، عن قبيصة بن حريث⁹ ، عن

سلمة بن المحبق¹⁰ قال: قال رسول الله ﷺ: (خذوا عني، خذوا عني، قد جعل الله

لهن سيلا، البكر بالبكر جلد مائة، ونفي سنة، والثيب بالثيب جلد مائة

والرجم)¹¹.

[55] أحمد: نا حسين بن محمد¹² ، نا سعيد¹³ ، عن سلمة¹⁴ ومجالد¹⁵ ، سمعا الشعبي

يحدث: (أن عليا حين رجم المرأة من أهل الكوفة ضرب بها يوم الخميس، ورجمها

يوم الجمعة، وقال: أجلدها بكتاب الله ، وأرجمها بسنة نبي الله ﷺ)¹⁶.

⁷ وكيع بن الجراح، أبو سفيان الرؤاسي، أحد الأعلام، قال أحمد: ما رأيت أوعى للعلم منه ولا أحفظ، وقال حماد بن زيد: لو شئت لقلت إنه أرحح من سفيان، ولد سنة 128، ومات 197. انظر الكاشف للذهبي ترجمة 6056.

⁸ قال أبو داود وغيره: ليس بالقوي. انظر الكاشف للذهبي ترجمة 4464.

⁹ الأنصاري البصري، مات سنة 67. انظر الكاشف للذهبي ترجمة 4544.

¹⁰ أبو سنان الهذلي، صحابي. انظر الكاشف للذهبي ترجمة 2047.

¹¹ صحيح. رواه أحمد 476/3.

¹² حسين بن محمد بن بهرام التميمي، قال ابن سعد: ثقة، وقال النسائي: ليس به بأس، وذكره ابن حبان في الثقات، وقال حنبل بن إسحاق: مات سنة 213. انظر تهذيب التهذيب لابن حجر: 435/1.

¹³ سعيد بن مسروق الثوري، ثقة، توفي سنة 126. انظر الكاشف للذهبي ترجمة 1957.

¹⁴ سلمة بن كهيل أبو يحيى الحضرمي، من علماء الكوفة، ثقة، مات سنة 121. انظر الكاشف للذهبي ترجمة 2046.

¹⁵ مجالد بن سعيد الهمداني، ضعفه ابن معين، وقال النسائي: ليس بالقوي، وقال مرة: ثقة. توفي سنة 144. انظر الكاشف للذهبي ترجمة 5286.

¹⁶ صحيح. رواه أحمد: 94/1.

[مسألة 25] الإسلام ليس بشرط في الإحصان

وقال أبو حنيفة ومالك: هو شرط.

[56] شريك¹⁷، عن سماك¹⁸، عن جابر بن سمرة قال: (رجم النبي ﷺ يهوديا

ويهودية)¹⁹.

[57] مالك، عن نافع، عن ابن عمر: (أن رسول الله ﷺ رجم يهوديا ويهودية)²⁰.

فذكروا:

[58] أبو بكر بن أبي مريم²¹، عن علي بن أبي طلحة²²، عن كعب بن مالك²³: (أنه

أراد أن يتزوج يهودية أو نصرانية، فسأل النبي ﷺ، فنهاه عنها، وقال: إنما لا

تحصنك²⁴)²⁵.

¹⁷ شريك بن عبد الله النخعي، أحد الأعلام، وثقه ابن معين، وقال غيره: سيع الحفظ، وقال النسائي: ليس به بأس،

هو أعلم بحديث الكوفيين من الثوري، توفي سنة 177، وعمره 82 سنة انظر الكاشف للذهبي ترجمة 2276.

¹⁸ سماك بن حرب، أبو المغيرة الذهلي، أحد علماء الكوفة، قال الذهبي ثقة ساء حفظه. وقال ابن المبارك: ضعيف

الحديث، وكان شعبة يضعفه، وقواه الجماعة. توفي سنة 123. انظر الكاشف للذهبي ترجمة 2141.

¹⁹ صحيح. رواه أحمد: 91/5.

²⁰ صحيح. رواه الترمذي برقم 1436 ص 1798، والبخاري برقم 6841 ص 571، ومسلم برقم 1699 ص 979.

²¹ الغساني، ضعفه، وله علم ورواية. انظر الكاشف للذهبي ترجمة 6526، وتهذيب التهذيب لابن حجر: 490/4.

ابن أبي مريم واه، وابن أبي طلحة ما لقي كعبا.

[59] إسحاق بن راهويه²⁶، نا عبد العزيز بن محمد²⁷، عن عبيد الله²⁸، عن نافع،

عن ابن عمر، عن النبي ﷺ قال: (من أشرك بالله فليس بمحصن)²⁹.

قيل: رجع إسحاق عن رفعه، وصوابه موقوف.

[مسألة 26] جراح المرأة تساوي جراح الرجل فيما دون الثلث فإذا بلغ الثلث فعلى

النصف منه

وعنه: تساويه.

²² مولى آل العباس، قال أحمد: له أشياء منكرا، مات سنة 143. انظر الكاشف للذهبي ترجمة 3931، وتهذيب

التهذيب لابن حجر: 171/3-172.

²³ من شعراء النبي صلى الله عليه وسلم، توفي سنة 50. انظر الكاشف للذهبي ترجمة 4663

²⁴ لوحة 155/أ.

²⁵ ضعيف. رواه الدارقطني 148/3.

²⁶ أبو يعقوب المروزي الإمام، أملى المسند من حفظه، عاش 77 سنة ومات سنة 238. انظر الكاشف للذهبي ترجمة

276، وتهذيب التهذيب لابن حجر: 112/1-113.

²⁷ هو الدراوردي تقدم في حديث 52.

²⁸ عبيد الله بن عمر بن حفص بن عاصم بن عمر بن الخطاب، الفقيه المدني الثبت، مات سنة 147. انظر الكاشف

للذهبي ترجمة 3576. وتهذيب التهذيب: 22/3-23.

²⁹ ضعيف. رواه الدارقطني 147/3.

وقال أبو حنيفة، والشافعي في الجديد: على النصف في الكل.

[60] (س) إسماعيل بن عياش، عن ابن جريج، عن عمرو بن شعيب، عن أبيه، عن

جده قال: قال رسول الله ﷺ: (عقل المرأة مثل عقل الرجل حتى يبلغ الثلث من

ديتها)³⁰.

قلت: إسماعيل في الحجازيين ضعيف.

[61] هشيم³¹، نا أشعث بن عبد الملك³²، عن الحسن ومحمد³³ قالوا: (القصاص

بين الرجل والمرأة فيما كان من العمد إلى ثلث الدية)³⁴.

[62] زكريا³⁵ وغيره، عن الشعبي: أن عليا كان يقول: (جراحات النساء على

النصف من دية الرجل فيما قل أو كثر)³⁶.

³⁰ ضعيف. رواه النسائي في القسامة باب عقل المرأة ص 2399 برقم 4809.

³¹ هشيم بن بشير أبو معاوية السلمي، إمام ثقة مدلس، عاش 83 سنة ومات سنة 183. انظر الكاشف للذهبي ترجمة 5979، وتهذيب التهذيب لابن حجر: 4/ 280.

³² الحمراي، وثقوه، توفي سنة 146. انظر الكاشف للذهبي ترجمة 447. وتهذيب التهذيب لابن حجر 181/1.

³³ هو أبو بكر محمد بن سيرين، أحد الأعلام، ثقة حجة كبير العلم ورع، مات سنة 110. انظر الكاشف للذهبي ترجمة 898.

[مسألة 27] دية الذمي إذا قتله المسلم عمدا دية المسلم فإن قتله خطأ فالنصف

وعنه: الثلث، ودية المجوسي ثمانمائة درهم.

وقال أبو حنيفة: دية الكافر فيهما دية المسلم.

وقال مالك: نصفها.

وقال الشافعي: ثلثها في العمد والخطأ، والمجوسي كقولنا.

لنا:

[63] علي بن الجعد³⁷، أنا أبو كرز القرشي، عن نافع، عن ابن عمر: أن النبي ﷺ

قال: (دية ذمي دية مسلم)³⁸.

³⁴ مقطوع. وقد عزاه ابن الجوزي إلى سنن سعيد بن منصور ولعله في القسم المفقود منه فلم أجده في المطبوع، كمل لم أعثر عليه في غيره من المصادر الحديثة.

³⁵ زكريا بن أبي زائدة الهمداني الحافظ، ثقة يدلس عن الشعبي، توفي سنة 149. انظر الكاشف للذهبي ترجمة 1643.

³⁶ منقطع. رواه البيهقي 95/8.

³⁷ الجوهري الحافظ، قال أبو زرعة: كان صدوقا في الحديث، عاش 96 سنة ومات سنة 230 في رجب. انظر الكاشف للذهبي ترجمة 3888، وتذيب التهذيب لابن حجر: 3/ 46-47.

³⁸ ضعيف جدا. أخرجه الدارقطني في سننه: 145/3.

قال ابن حبان: لا يحل أن يحتج بأبي كرز، واسمه: عبد الله بن عبد الملك بن

كرز³⁹.

[64] أبو بكر بن عياش⁴⁰، عن أبي سعد⁴¹، عن عكرمة، عن ابن عباس: (جعل

رسول الله ﷺ دية العامريين دية المسلم. قال أبو بكر: كان لهما عهد)⁴².

أبو سعد هو: سعد بن المرزبان، واه.

[65] عثمان الوقاصي⁴³، عن الزهري، عن علي بن الحسين⁴⁴، عن عمرو بن

عثمان⁴⁵، عن أسامة⁴⁶: (أن رسول الله ﷺ جعل دية المعاهد كدية المسلم)⁴⁷.

³⁹ في سنن الدارقطني: 145/3: "عبد الله بن عبد الملك الفهري".

⁴⁰ الأسدي الكوفي الحنات المقرئ، قال أحمد: صدوق ثقة ربما غلط، مات 193. انظر الكاشف للذهبي ترجمة 6535.

⁴¹ سعيد بن المرزبان العبسي، أبو سعد البقال الكوفي الأعور، قال البخاري: منكر الحديث، وقال النسائي: ضعيف

ليس بثقة، وقال أبو حاتم: فيه تدليس، وقال العجلي: ضعيف. انظر تهذيب التهذيب لابن حجر: 41/2-42.

⁴² ضعيف جدا. رواه الدارقطني 171/3.

⁴³ عثمان بن عبد الرحمن أبو عمرو الوقاصي، قال البخاري: تركوه. انظر الكاشف للذهبي ترجمة 3717.

⁴⁴ علي بن الحسين، زين العابدين الهاشمي، قال الزهري: ما رأيت قرشيا أفضل منه. وقال ابن سعد: ثقة، مات سنة

94. انظر الكاشف للذهبي ترجمة 3900، وتهذيب التهذيب لابن حجر: 154/3-155.

⁴⁵ عمرو بن عثمان بن عفان، مدي من كبار التابعين، قال ابن سعد، والذهبي وغيرهما: ثقة. انظر الكاشف للذهبي

ترجمة 4196، وتهذيب التهذيب لابن حجر: 292/3.

⁴⁶ أسامة بن زيد بن حارثة، حب رسول الله صلى الله عليه وسلم وابن حبه، مات سنة 54. انظر الكاشف للذهبي

ترجمة 264.

⁴⁷ ضعيف جدا. رواه الدارقطني 145/3.

عثمان متروك، رواهم⁴⁸ الدارقطني.

واحتجوا لقتله خطأ:

[66] محمد بن إسحاق، عن عمرو بن شعيب، عن أبيه، عن جده، عن النبي ﷺ

قال: (دية الكافر نصف دية المسلم)⁴⁹.

[67] محمد بن راشد، نا سليمان⁵⁰، عن عمرو بن شعيب، عن أبيه، عن جده: (أن

رسول الله ﷺ قضى أن عقل أهل الكتابين نصف عقل⁵¹ دية المسلم)⁵².

فهذا يحمل على قتل الخطأ.

رواهما أحمد.

[68] زائدة⁵³، عن منصور⁵⁴، عن ثابت أبي المقدام⁵⁵، عن سعيد بن المسيب: (أن

عمر جعل دية اليهودي والنصراني أربعة آلاف، والجوسي ثمانمائة)⁵⁶.

⁴⁸ يعني الأحاديث الثلاثة السابقة.

⁴⁹ حسن. رواه أحمد: 180/2.

⁵⁰ سليمان بن موسى الأموي، مولاهم الدمشقي الأشدق، أحد الأئمة، قال النسائي: ليس بالقوي، وقال البخاري عنده مناكير، توفي سنة 119. انظر الكاشف للذهبي ترجمة 2133، وتهذيب التهذيب لابن حجر: 112-111/2.

⁵¹ لوحة 155/ب.

[مسألة 28] قيمة العبد إذا قتل خطأ في مال الجاني وكذا الجناية على أطرافه

وقال أبو حنيفة: بدل نفسه على عاقلة الجاني، والأطراف في ماله.

وعن الشافعي كقولنا.

وعنه: الكل على العاقلة.

[69] وكيع، عن عبد الملك بن حسين النخعي⁵⁷، عن عبد الله بن أبي السفر⁵⁸، عن

عامر⁵⁹، عن عمر قال: (العمد، والعبد، والصلح، والاعتراف لا تعقله

العاقلة)⁶⁰.

⁵² صحيح. رواه أحمد: 183/2.

⁵³ زائدة بن قدامة أبو الصلت الثقفي الكوفي الحافظ، ثقة حجة صاحب سنة، توفي غازيا بالروم سنة 161. انظر الكاشف للذهبي ترجمة 1608.

⁵⁴ منصور بن المعتمر أبو عتاب السلمي، من أئمة الكوفة، قال الآجري: لا يروي إلا عن ثقة، وقال العجلي: ثقة ثبت في الحديث، مات سنة 132. انظر الكاشف للذهبي ترجمة 5647، وتهذيب التهذيب لابن حجر: 159/4-160.

⁵⁵ ثابت بن هرمز الكوفي، قال أحمد وابن معين: ثقة، وقال أبو حاتم: صالح. انظر تهذيب التهذيب لابن حجر: 269/1.

⁵⁶ منقطع. رواه الدارقطني: 170/3.

⁵⁷ قال الدوري عن ابن معين: ليس بشيء، وقال عمرو بن علي الفلاس: ضعيف منكر الحديث، وقال أبو زرعة وأبو حاتم: ضعيف الحديث. انظر تهذيب التهذيب لابن حجر: 580/4-581.

⁵⁸ قال أحمد وابن معين والنسائي: ثقة. انظر تهذيب التهذيب لابن حجر: 347/2.

⁵⁹ هو عامر بن شراحيل الشعبي، تقدم في حديث رقم 1.

[مسألة 29] اللواط يوجب الحد

وقال أبو حنيفة: يوجب التعزير⁶¹.

[70] أحمد، نا أبو القاسم بن أبي الزناد⁶²، أخبرني ابن أبي حبيبة⁶³ وداود بن

الحصين⁶⁴، عن عكرمة، عن ابن عباس قال: قال رسول الله ﷺ: (اقتلوا الفاعل

والمفعول به في عمل قوم لوط، والبهيمة والواقع عليها، ومن وقع على⁶⁵ ذات

محرم فاقتلوه)⁶⁶.

قلت: أبو القاسم قال ابن معين: ليس به بأس.

⁶⁰ ضعيف جدا. رواه الدارقطني: 177/3.

⁶¹ التعزير في اللغة المنع، وفي الشرع: التأديب فيما دون الحد، أو هو عقوبة غير مقدرة شرعا في كل معصية ليس فيها حد. انظر المطلع ص374، والموسوعة الفقهية 254/12.

⁶² أنى عليه أحمد، وقال ابن معين: ليس به بأس. انظر تهذيب التهذيب لابن حجر: 573/4.

⁶³ إبراهيم بن إسماعيل بن أبي حبيبة الأشعري، قوام صوام، قال أحمد والعجلي: ثقة، وقال ابن معين: ليس بشيء، وقال البخاري: منكر الحديث، وقال النسائي: ضعيف، وقال الدارقطني وغيره: متروك، مات سنة 165. انظر الكاشف للذهبي ترجمة 114، وتهذيب التهذيب لابن حجر: 58/1.

⁶⁴ وثقه ابن معين وغيره، وقال ابن المديني: ما روى عن عكرمة فمنكر، وقال أبو حاتم: لولا أن مالكا روى عنه لترك حديثه، وقال ابن عيينة: كنا نتقي حديثه، وقال أبو زرعة: لين. توفي سنة 135. انظر الكاشف للذهبي ترجمة 1434.

⁶⁵ كلمة "على" تكررت في الأصل.

⁶⁶ صحيح. رواه أحمد: 300/1.

[مسألة 30] إتيان البهيمة يوجب الحد كحد اللوطي

وعنه: يوجب التعزير. كقول أبي حنيفة ومالك.

لنا الحديث تراه⁶⁷.

[71] وحديث سليمان بن بلال⁶⁸، عن عمرو بن أبي عمرو⁶⁹، عن عكرمة، عن

ابن عباس، أن رسول الله ﷺ قال: (من وقع على بهيمة فاقتلوه، واقتلوا

البهيمة)⁷⁰.

[مسألة 31] إذا تزوج ذات محرم ووطئ حد

وقال أبو حنيفة: يعزر.

لنا: ما في الحديث المذكور: (من وقع على ذات محرم فاقتلوه).

⁶⁷ أي حديث ابن عباس المتقدم برقم 70.

⁶⁸ أبو محمد مولى آل الصديق، ثقة إمام، توفي سنة 172. انظر الكاشف للذهبي ترجمة 2073.

⁶⁹ مولى المطلب، صدوق، قال أحمد: ليس به بأس، وقال ابن معين وأبو داود: ليس بالقوي. انظر الكاشف للذهبي ترجمة 4202.

⁷⁰ صحيح. رواه أحمد: 269/1.

[72] أحمد: نا وكيع، نا حسن بن صالح⁷¹، عن السدي⁷²، عن عدي بن ثابت⁷³،

عن البراء قال: (لقيت خالي -يعني: أبا بردة- ومعه الراية، فقلت: أين تريد؟

قال: بعثني رسول الله ﷺ إلى رجل تزوج امرأة أبيه من بعده، أن أضرب عنقه،

وآخذ ماله)⁷⁴.

[مسألة 32] ومن أذنت لزوجها في وطء جارياتها ففعل جلد مائة

وقال أكثرهم: حده حد الزاني.

[73] ابن أبي عروبة، عن قتادة، عن حبيب بن سالم⁷⁵ رفعه إلى النعمان بن بشير:

(في رجل أحلت له امرأته جارياتها فقال: لأقضين فيها بقضية رسول الله ﷺ :

⁷¹ حسن بن صالح بن حي الهمداني، أبو عبد الله الفقيه، صدوق، توفي سنة 169، انظر الكاشف للذهبي ترجمة 1037.

⁷² إسماعيل بن عبد الرحمن الكوفي، حسن الحديث، وقال ابن أبي حاتم: لا يحتج به، مات سنة 127. انظر الكاشف للذهبي ترجمة 391.

⁷³ الأنصاري، قاص الشيعة، وإمام مسجدهم بالكوفة، ثقة، توفي سنة 116. انظر الكاشف للذهبي ترجمة 3758.

⁷⁴ صحيح. رواه أحمد 292/4.

⁷⁵ وثقه أبو حاتم، وقال البخاري: فيه نظر. انظر الكاشف للذهبي ترجمة 908، وتهديب التهذيب لابن حجر:

إن كانت أكلتها له لأجلدنه مائة، وإن لم تكن أكلتها⁷⁶ له لأرجمنه ، فوجدتها

قد أكلتها له ، فجلده مائة⁷⁷.

رواه أحمد، عن يزيد⁷⁸ ، عنه⁷⁹.

[مسألة 33] إذا أقر بزنا امرأة فجحدت لم يسقط عنه الحد

وقال أبو حنيفة: يسقط.

[74] أحمد: نا حسين بن محمد، نا مسلم بن خالد⁸⁰ ، عن عباد بن إسحاق⁸¹ ، عن

أبي حازم⁸² ، عن سهل⁸³ : (أن رجلا من أسلم جاء إلى رسول الله ﷺ فقال: إنه

قد زنى بامرأة سماها، فأرسل النبي ﷺ إليها، فأنكرت، فحده وتركها)⁸⁴.

⁷⁶ لوحة 156/أ.

⁷⁷ صحيح. رواه أحمد 277-276/4.

⁷⁸ أي ابن هارون بن زاذان السلمي مولاهم، أبو خالد الواسطي، ثقة متقن عابد، مات سنة 206 وقد قارب التسعين.

تقريب التقریب لابن حجر ترجمة 7789.

⁷⁹ أي عن سعيد بن أبي عروبة، وقد تقدمت ترجمته في حديث رقم 2.

⁸⁰ مسلم بن خالد الزنجي المكي، أبو خالد مولى بني مخزوم، عالم الحرم، وثق، وضعفه أبو داود لكثرة غلطه، مات سنة

180. انظر الكاشف للذهبي ترجمة 5413.

مسلم⁸⁵ قال البخاري: منكر الحديث⁸⁶.

قلت: وشيخه لين⁸⁷.

[مسألة 34] حد الزنى لا يثبت بإقرار مرة

خلافًا لمالك والشافعي.

لنا: حديث ماعز.

[75] أبو عوانة⁸⁸: عن سماك، عن سعيد بن جبير⁸⁹، عن ابن عباس قال: (لقي

رسول الله ﷺ ماعز بن مالك، فقال: أحق ما بلغني عنك؟ قال: وما بلغك

⁸¹ اسمه عبد الرحمن بن إسحاق القرشي، ويدعى عبادا، قال أبو داود: قدرى ثقة، وضعفه بعضهم، وقال البخاري: ليس ممن يعتمد على حفظه، وقال أحمد: صالح الحديث، وقال مرة: ليس به بأس، وقال الدارقطني: ضعيف. انظر الكاشف للذهبي ترجمة 3138، وتهذيب التهذيب لابن حجر: 487/2.

⁸² سلمة بن دينار المدني الأعرج، قال ابن خزيمة: ثقة لم يكن في زمانه مثله، وقال أحمد وأبو حاتم والنسائي: ثقة، توفي سنة 140. انظر الكاشف للذهبي ترجمة 2029، وتهذيب التهذيب لابن حجر: 71/2.

⁸³ سهل بن سعد الساعدي أبو العباس، صحابي، مات سنة 88 أو 91. انظر الكاشف للذهبي ترجمة 2171.

⁸⁴ ضعيف. رواه أحمد: 339/5-340.

⁸⁵ يعني مسلم بن خالد المذكور في إسناده الحديث.

⁸⁶ التاريخ الكبير للبخاري: 260/7.

⁸⁷ وهذه فائدة لم يصرح بها في بقية كتبه. انظر ميزان الاعتدال: 258/4، وديوان الضعفاء: 90/2، والمغني في الضعفاء: 594/1. وهو مخالف لما اختاره ابن حجر حيث قال عنه: صدوق، رمي بالقدر. انظر التقريب ترجمة 3800.

عني؟ قال: أنك فجرت بأمة آل فلان؟ قال: نعم. فردّه حتى شهد أربع موات،

ثم أمر برجمه⁹⁰.

تابعه شريك مختصرا.

[76] ورواه إسرائيل، عن سماك. ولفظه: (اعترف عنده مرتين، فقال: اذهبوا به.

ثم قال: ردوه، فاعترف مرتين، حتى اعترف أربعاً، فقال: ارجموه)⁹¹.

[77] أحمد: نا أسود بن عامر⁹²، ثنا إسرائيل، عن جابر، عن عامر، عن عبد الرحمن

بن أبزى⁹³، عن أبي بكر⁹⁴ قال: (كنت جالسا عند النبي ﷺ، فجاء ماعز

⁸⁸ وضاح بن عبد الله الشكري، أبو عوانة الحافظ، مولى يزيد بن عطاء، ثقة متقن لكتابه، توفي سنة 176. انظر الكاشف للذهبي ترجمة 6049.

⁸⁹ أحد الأعلام، قال الطبري: ثقة إمام حجة على المسلمين. قتل في شعبان شهيدا سنة 95. انظر الكاشف للذهبي ترجمة 1860.

⁹⁰ صحيح. رواه أحمد: 245/1، 328.

⁹¹ صحيح. رواه أحمد 314/1.

⁹² أسود بن عامر الشامي، نزيل بغداد، يكنى أبا عبد الرحمن، ويلقب شاذان، ثقة، مات في أول سنة 208. انظر تقريب التهذيب لابن حجر ترجمة 503. والكاشف للذهبي ترجمة 422.

⁹³ الخزاعي مولاهم، ولي خراسان لعلي بن أبي طالب، ذكر البخاري أن له صحبة، وذكره ابن حبان في ثقات التابعين. انظر تهذيب التهذيب لابن حجر: 485/2.

⁹⁴ الصديق، واسمه عبد الله بن عثمان بن عامر، توفي في جمادى الأولى سنة 13 عن 63 سنة. انظر الكاشف للذهبي ترجمة 2850.

فاعترف عنده، فردّه، فاعترف الثانية فردّه، ثم جاء فاعترف الثالثة فردّه، فقلت

له: إنك إن اعترفت الرابعة رجمك، فاعترف الرابعة، فحبسه، ثم سأل عنه

فقالوا: ما نعلم إلا خيراً، فأمر برجمه⁹⁵.

قلت: جابر واه.

[78] حجاج بن أرطأة، عن عبد الملك بن المغيرة⁹⁶، عن عبد الله بن المقدام⁹⁷، عن

ابن شداد⁹⁸، عن أبي ذر⁹⁹ قال: (كنا مع رسول الله ﷺ فأتاه رجل فقال: إن

الآخر قد زنى. فأعرض عنه، ثم ثنى، ثم ثلث، ثم ربع، فأمرنا به، فحفرنا له،

فرجم¹⁰⁰).

⁹⁵ صحيح. رواه أحمد: 8/1.

⁹⁶ عبد الملك بن المغيرة الطائفي، ذكره ابن حبان في الثقات، وقال الذهبي: وثق، وقال ابن حجر: مقبول. انظر الكاشف للذهبي ترجمة 3485، وتهذيب التهذيب لابن حجر: 627/2، وتقريب التهذيب ترجمة 4220.

⁹⁷ قال ابن حجر: ليس بالمشهور. انظر تعجيل المنفعة لابن حجر: 770/1.

⁹⁸ عبد الله بن شداد بن الهاد الليثي، أبو الوليد المدني، ولد على عهد النبي صلى الله عليه وسلم، وذكره العجلي من كبار التابعين الثقات، وكان معدوداً في الفقهاء، مات بالكوفة مقتولاً سنة 81، وقيل بعدها. انظر تقريب التهذيب لابن حجر ترجمة 3382.

⁹⁹ اختلف في اسمه، وقال ابن حجر: جندب بن جنادة على الأصح، صحابي مشهور، تقدم إسلامه، وتأخرت هجرته فلم يشهد بدرًا، ومناقبه كثيرة جداً، مات سنة 32 في خلافة عثمان. انظر تقريب التهذيب لابن حجر ترجمة 8087.

¹⁰⁰ صحيح. رواه أحمد: 179/5.

[79] هشام بن سعد¹⁰¹، أخبرني يزيد بن نعيم بن هزال¹⁰²، عن أبيه¹⁰³ قال: (كان

ما عز بن مالك في حجر أبي، فأصاب جارية من الحي، فقال له أبي: انت رسول

الله فأخبره بما صنعت، لعله يستغفر لك، وإنما يريد بذلك رجاء أن يكون لله

مخرج، فأتاه فقال: يا رسول الله، زيت، فأقم علي كتاب الله، فأعرض عنه إلى

أن أتاه الرابعة، فقال له: إنك قد قلتها أربع مرات، فبمن؟ قال: بفلانة. قال:

هل ضاجعتها؟ قال: نعم. قال: هل باشرتها؟ قال: نعم. قال: هل جامعتها¹⁰⁴؟

قال: نعم. فأمر به فرجم. فوجد مس الحجارة، فخرج يشدد، فلقبه عبد الله بن

أنيس فنزع له¹⁰⁵ بوظيف¹⁰⁶ بعير فقتله، وذكر ذلك للنبي ﷺ فقال: هلا

¹⁰¹ أبو سعيد المدني، قال أبو حاتم: لا يحتج به، وقال أحمد: لم يكن بالحافظ، وقال الذهبي: حسن الحديث، وقال ابن حجر صدوق له أوهام ورمي بالتشيع، مات سنة 160 أو قبلها. انظر الكاشف للذهبي ترجمة 5964، وتهذيب التهذيب لابن حجر: 270/4-271، والتقريب ترجمة 7294.

¹⁰² ذكره ابن حبان في الثقات، وقال البخاري: سمع جابرا، وقال الذهبي: وثق. وقال ابن حجر: مقبول، وروايته عن حجه مرسله. انظر الكاشف للذهبي ترجمة 6363، وتهذيب التهذيب لابن حجر: 431/4، وتقريب التهذيب لابن حجر ترجمة 7787.

¹⁰³ نعيم بن هزال الأسلمي، قال الذهبي: مختلف في صحبته، وحزم ابن حجر بأنه صحابي، لم يرو عنه إلا ابنه يزيد. انظر الكاشف للذهبي ترجمة 6363، وتقريب التهذيب لابن حجر ترجمة 7176.

¹⁰⁴ لوحة 156/ب.

¹⁰⁵ رماه. لسان العرب : 351/8.

تركتموه، لعله يتوب، فيتوب الله عليه. فحدثني أبي، نعيم بن هزال، عن أبيه،

أن رسول الله ﷺ قال له حين رآه: (والله يا هزال، لو كنت سترته بثوبك كان

خيبراً مما صنعت به)¹⁰⁷.

قلت: هذا القول مرسل. روى الأحاديث أحمد.

[80] (م) بشير بن المهاجر¹⁰⁸، نا عبد الله بن بريدة، عن أبيه قال: (كنت عند النبي

ﷺ إذ جاءه ماعز فقال: إني قد زنيت. ..) الحديث. وفيه: (فأمر، فحفر له

حفرة جعل فيها إلى صدره، ثم أمر الناس أن يرموه. قال بريدة: فكنا نتحدث

أصحاب نبي الله ﷺ بينما أنه لو جلس بعد اعترافه ثلاثاً لم يطلبه، وإنما رجمه

عند الرابعة)¹⁰⁹.

¹⁰⁶ وظيف البعير خفه، وهو له كالحافر للفرس. النهاية لابن الأثير: 205/5.

¹⁰⁷ صحيح. رواه أحمد: 216/5-217.

¹⁰⁸ الكوفي الغنوي، قال أحمد منكر الحديث، وقال البخاري: يخالف في بعض حديثه، وقال ابن حبان: دلس عن أنس ولم يره، ويخطئ كثيراً، وقال الذهبي: ثقة فيه شيء، وقال ابن حجر: صدوق لين الحديث، رمي بالإرجاء. انظر الكاشف للذهبي ترجمة 610، والتهذيب لابن حجر: 236/1، والتقريب ترجمة 723.

¹⁰⁹ صحيح. رواه أحمد: 347/5، ومسلم في الحدود باب من اعترف على نفسه بالزنا ص 978 برقم 1695.

[81] (خ، م) عبد الرحمن بن خالد¹¹⁰، عن ابن شهاب، عن ابن المسيب، عن أبي

هريرة قال: (أتى رسول الله ﷺ رجل من أسلم، وهو في المسجد، فناداه: يا

رسول الله، إن الآخر قد زنى، فأعرض عنه، فتنحى لشق وجهه الذي أعرض

قبله، فقال: إني زنيت، فأعرض عنه، فجاء لشق وجهه الذي أعرض عنه، فلم-

شهد على نفسه أربع شهادات دعاه النبي ﷺ فقال: أبك جنون؟ قال: لا يا

رسول الله. قال: أحصنت؟ قال: نعم. قال: اذهبوا به فارجموه¹¹¹.

[82] (ت) محمد بن عمرو¹¹²، نا أبو سلمة، عن أبي هريرة قال: (جاء ماعز إلى

رسول الله ﷺ فقال: إنه قد زنى، فأعرض عنه ..). وفيه (فلما وجد مس¹¹³

الحجارة مر يشدد ..). وفيه (قال: هلا تركتموه¹¹⁴).

¹¹⁰ أمير مصر، قال أبو حاتم: صالح، وقال النسائي: ليس به بأس، وقال العجلي والدارقطني: ثقة. انظر تهذيب التهذيب لابن حجر: 500-499/2.

¹¹¹ صحيح. رواه البخاري في الطلاق باب الطلاق في الإغلاق والكراهة ص 455 برقم 5271، ومسلم في الحدود بلب من اعترف على نفسه بالزنا ص 977 برقم 1691.

¹¹² محمد بن عمرو بن علقمة بن وقاص الليثي، قال أبو حاتم: يكتب حديثه، وقال النسائي: ليس به بأس، مات سنة 144. انظر الكاشف للذهبي ترجمة 5087.

¹¹³ ضرب الحجارة.

قلت: وفي الباب أحاديث أخر. فاحتجوا:

[83] بحديث العسيف¹¹⁵، وفيه (واغد يا أنيس على امرأة هذا، فإن اعترفت

فارجمها)¹¹⁶.

قلنا: إن اعترفت الاعتراف المعلوم بالتردد.

[مسألة 35] إذا أقر بالزنى ثم أنكر سقط الحد

خلافا لداود، وإلحدى الروايتين عن مالك.

لنا: أن ماعزا لما رجم هرب فقال عليه السلام: (هلا تركتموه).

[مسألة 36] للسيد إقامة الحد على رقيقه

خلافا لأبي حنيفة¹¹⁷.

¹¹⁴ صحيح. رواه الترمذي في الحدود باب ما جاء في درء الحد عن المعترف إذا رجع ص 1796 برقم 1428.

¹¹⁵ أي الأجير. النهاية: 237/3.

¹¹⁶ صحيح. رواه البخاري برقم 6827، 6842، 7193 ص 569، 571، 600، ومسلم برقم 1697 ص 979.

¹¹⁷ لوحة 157/أ.

[84] الثوري، عن عبد الأعلى الثعلبي¹¹⁸، عن أبي جميلة الطهوي¹¹⁹، عن علي:

(أن خادما للنبي ﷺ أحدث¹²⁰، فأمر النبي ﷺ أن أقيم عليها الحد، فأتيها

فوجدتها لم تجف من دمها، فأتيته فأخبرته، فقال: إذا جفت من دمها فأقم

عليها الحد. أقيموا الحدود على ما ملكت أيما نكم). رواه أحمد¹²¹.

[85] (ت) أبو خالد الأحمر، عن الأعمش¹²²، عن أبي صالح¹²³، عن أبي هريرة

قال: قال رسول الله ﷺ: (إذا زنت أمة أحدكم فليجلدها، ثلاثا، فإن عادت

فليبعها ولو بحبل من شعر). صحيحهما (ت)¹²⁴.

¹¹⁸ عبد الأعلى بن عامر الثعلبي الكوفي، قال الذهبي: لين، ضعفه أحمد. وقال ابن حجر: صدوق يهم. انظر الكاشف

للذهبي ترجمة 3077، وتقريب التهذيب لابن حجر ترجمة 3731.

¹¹⁹ اسمه ميسرة بن يعقوب، قال الذهبي: وثق. وقال ابن حجر: مقبول. انظر الكاشف للذهبي ترجمة 5754. و تقريب

التهذيب لابن حجر ترجمة 7039.

¹²⁰ المراد بالحدث هنا الزنا.

¹²¹ صحيح. رواه أحمد في المسند: 1/135، 136، 145.

¹²² سليمان بن مهران الأعمش، أبو محمد الكاهلي، عاش 88 سنة، قال أبو نعيم: مات سنة 148. انظر الكاشف

للذهبي ترجمة 2132.

¹²³ اسمه ذكوان السمان من الأئمة الثقات، توفي بالمدينة سنة 101. انظر الكاشف للذهبي ترجمة 8489.

¹²⁴ صحيح. رواه الترمذي في الحدود باب ما جاء في إقامة الحد على الإماء ص 1798 برقم 1440.

[86] (خ، م) الزهري، عن عبيد الله¹²⁵، عن أبي هريرة، وزيد بن خالد¹²⁶،

وشبل¹²⁷ قالوا: (سئل رسول الله ﷺ عن الأمة تزني قبل أن تحصن؟ قال:

اجلدوها، فإن عادت فاجلدوها، فإن عادت فاجلدوها، فإن عادت فبيعوها ولو

بضفير¹²⁸)¹²⁹.

¹²⁵ عبيد الله بن عبد الله بن عتبة بن مسعود الهذلي، الفقيه الأعمى، كان من بحور العلم، مات سنة 98. انظر الكاشف للذهبي ترجمة 3562.

¹²⁶ الجهني، صحابي توفي سنة 78 وله 85 سنة. انظر الكاشف للذهبي ترجمة 1734.

¹²⁷ يقال: شبل بن حامد، ويقال: ابن خالد، ويقال: ابن خليلد المزني، قيل صحابي، وقيل تابعي ولذا أسقطه البخاري. وقال ابن حجر: مقبول. انظر الكاشف للذهبي ترجمة 2232، وتهذيب التهذيب لابن حجر: 473/2، والتقريب ترجمة 2736.

¹²⁸ الضفير حبل مفتول من شعر. النهاية 93/3.

¹²⁹ صحيح. أخرجه أحمد: 116/4، 117، والبخاري في الحدود باب إذا زنت الأمة ص 571 برقم 6837، 6838، ومسلم في الحدود باب رجم اليهود أهل الذمة في الزنا ص 980. وليس في الصحيحين ذكر لشبل، وإنما هو في رواية الترمذي برقم 1433، وقد قال بعد أن روى الحديث: "حديث أبي هريرة وزيد بن خالد حديث حسن صحيح، وهكذا روى مالك بن أنس ومعمر وغير واحد، عن الزهري، عن عبيد الله بن عبد الله بن عتبة، عن أبي هريرة وزيد بن خالد، عن النبي ﷺ، ورووا بهذا الإسناد عن النبي ﷺ أنه قال: (إذا زنت الأمة فاجلدوها فإن زنت في الرابعة فبيعوها ولو بضفير).

وروى سفيان بن عيينة، عن الزهري، عن عبيد الله، عن أبي هريرة وزيد بن خالد وشبل قالوا: (كنا عند النبي ﷺ). هكذا روى ابن عيينة الحديثين جميعاً عن أبي هريرة وزيد بن خالد وشبل، وحديث ابن عيينة وهم فيه سفيان بن عيينة، أدخل حديثاً في حديث، والصحيح: ما روى محمد بن الوليد الزبيدي، ويونس بن عبيد، وابن أخي الزهري، عن الزهري، عن عبيد الله، عن أبي هريرة وزيد بن خالد، عن النبي ﷺ قال: (إذا زنت الأمة فاجلدوها).

والزهري، عن عبيد الله، عن شبل بن خالد، عن عبد الله بن مالك الأوسي، عن النبي ﷺ قال: (إذا زنت الأمة). وهذا الصحيح عند أهل الحديث، وشبل بن خالد لم يدرك النبي ﷺ، إنما روى شبل عن عبد الله بن مالك الأوسي، عن النبي ﷺ، وهذا الصحيح، وحديث ابن عيينة غير محفوظ، وروى عنه أنه قال: شبل بن حامد، وهو خطأ، إنما هو: شبل بن خالد، ويقال أيضاً شبل بن خليلد. وانظر أيضاً ترجمة شبل في تهذيب التهذيب لابن حجر 473/2.

[مسألة 37] حد شارب الخمر ثمانون

وعنه: أربعون.

[87] (ت) شعبة، سمعت قتادة، عن أنس عن النبي ﷺ : (أنه أتى برجل قد شرب

الخمر، فضربه بجريدتين¹³⁰ نحو الأربعين، وفعله أبو بكر، فلما كان عمر

استشار الناس، فقال عبد الرحمن بن عوف: أخف الحدود ثمانون، فأمر به

عمر¹³¹.

لم يحد رسول الله ﷺ في ذلك حداً، ولو حده لم يتجاوزهُ، وإنما ضرب تأديباً

وعقوبة، فبلغ الضرب نحو أربعين، وفهمت الصحابة أن المقصود الزجر، فألحقوه بحد

القذف، وهذا مذهب عمر، وعثمان، وابن عوف، وطلحة، والزبير.

[مسألة 38] يضرب في الحدود جميع الجسد سوى الرأس والوجه والفرج

وقال مالك: الظهر وما قاربه حسب.

[88] ابن أبي ليلى، عن عدي بن ثابت، أخبرني هنيذة بن خالد: (أنه شهد عليا أقام

على رجل حدا، فقال للجلاد: اضربه، وأعط كل عضو منه حقه، واتفق وجهه

ومذاكيره¹³² (¹³³).

[مسألة 39] لا يحد في دار الحرب

خلفا لمالك والشافعي¹³⁴.

[89] ابن لهيعة، نا عياش¹³⁵ بن عباس¹³⁶، عن شبيب بن بيتان¹³⁷، عن جنادة بن أبي

أمية¹³⁸: (أنه قال على المنبر بروذ¹³⁹، حين جلد الرجلين اللذين سرقا غنائم

¹³⁰ الجريدة سعة طويلة، رطبة أو يابسة، أو التي تقشر من خوصها. القاموس المحيط للفيروزابادي ص 347.

¹³¹ صحيح. رواه الترمذي في الحدود باب ما جاء في حد السكران ص 1798 برقم 1443.

¹³² جمع الذكر، على غير قياس. النهاية: 164/2.

¹³³ ضعيف. رواه البيهقي في السنن الكبرى: 327/8.

¹³⁴ انظر المغني لابن قدامة: 172/13.

¹³⁵ لوحة 157/ب.

¹³⁶ القتباني، قال ابن معين: ثقة، وقال أبو حاتم: صالح، وذكره ابن حبان في الثقات، مات سنة 133. انظر تهذيب

التهذيب لابن حجر: 351/3.

¹³⁷ البلوي، وثقه ابن معين والذهبي، وقال أبو بكر البزار: شبيب غير مشهور. انظر تهذيب التهذيب لابن حجر:

186/2-187.

¹³⁸ الأزدي، مختلف في صحبته، توفي سنة 80. انظر الكاشف للذهبي ترجمة 815.

الناس فقال: إنه لم يمنعني من قطعهما إلا أن بسر بن أرطأة وجد رجلا سرق في

الغزو، فجلده، ولم يقطع يده، وقال: هانا رسول الله ﷺ عن القطع في

الغزو¹⁴⁰.

فيه ابن لهيعة.

[90] سعيد في سننه¹⁴¹: نا إسماعيل بن عياش، عن أبي بكر بن أبي مریم، عن حميد

بن عقبة¹⁴²، عن أبي الدرداء¹⁴³: (أنه كان ينهى أن تقام الحدود على الرجل

وهو غاز، حتى يقفل مخافة أن تلحقه الحمية، فيلحق بالكفار)¹⁴⁴.

قلت: ابن أبي مریم ضعيف، ومن حميد هذا ؟ !

¹³⁹ كذا في الأصل وتحقيق ابن الجوزي: 333/2، وتنقيح ابن عبد الهادي: 312/3. وفي المسند "رودس". وهي جزيرة من بلاد الروم.

¹⁴⁰ ضعيف. رواه أحمد: 181/4، وأبو داود برقم 4408 ص 1545.

¹⁴¹ (196/2).

¹⁴² حميد بن عقبة بن رومان بن زرارعة، أبو سنان الفزاري، وثقه ابن حبان. انظر تعجيل المنفعة لابن حجر: 473/1-474.

¹⁴³ اسمه عويمر بن مالك، وقيل: ابن عامر، وقيل: ابن ثعلبة، صحابي جليل، مات سنة 32. انظر الكاشف للذهبي ترجمة 4322.

¹⁴⁴ ضعيف. رواه سعيد بن منصور في سننه: 196/2. وتتمه الحديث "فإن تابوا تاب الله عليهم، وإن عادوا فإين عقوبة الله من ورائهم".

واحتجوا بهذا:

[91] (د) الحسن بن يحيى الخشني¹⁴⁵، عن زيد بن واقد¹⁴⁶، عن مكحول، عن

عبادة بن الصامت: قال رسول الله ﷺ: (أقيموا الحدود في الحضر والسفر، على

القريب والبعيد، ولا تبالوا في الله لومة لائم)¹⁴⁷.

إسناده واه، ولكن حجتهم العموم، ومن خصص الغزو طولب بالحجة.

التعزير

[مسألة 40] لا يبلغ به أعلى الحدود

وقال مالك: يعزر الإمام باجتهاده، وإن زاد على الحد.

¹⁴⁵ قال الذهبي: وهاه جماعة، وقال دحيم وغيره: لا بأس به. الكاشف للذهبي ترجمة 1074.

¹⁴⁶ القرشي الدمشقي، ثقة، توفي سنة 138. الكاشف للذهبي ترجمة 1757.

¹⁴⁷ ضعيف. رواه أبو داود في المراسيل برقم 241 ص 203.

[92] (خ، م) يزيد بن أبي حبيب¹⁴⁸، عن بكير¹⁴⁹، عن سليمان بن يسار¹⁵⁰، عن

عبد الرحمن بن جابر¹⁵¹، عن أبي بردة¹⁵² أن رسول الله ﷺ قال: (لا يجلد فوق

عشر جلدات إلا في حد)¹⁵³.

وروى أصحابنا مرفوعا:

[93] (من بلغ حدا في غير حد فهو من المعتدين)¹⁵⁴.

السرقه

[مسألة 41] نصابها ربع دينار أو ثلاثة دراهم أو قيمة ذلك

¹⁴⁸ أبو رجاء الأزدي، عالم أهل مصر، ثقة من العلماء الحكماء الأتقياء، مات سنة 128. انظر الكاشف للذهبي ترجمة

6289.

¹⁴⁹ بكير بن عبد الله بن الأشج، ثبت إمام، توفي سنة 127. انظر الكاشف للذهبي ترجمة 644.

¹⁵⁰ مولى ميمونة أم المؤمنين، كان من فقهاء المدينة، قال أبو زرعة: ثقة مأمون عابد فاضل، يقال: مات سنة 107.

انظر الكاشف للذهبي ترجمة 2136.

¹⁵¹ أبو عتيق عبد الرحمن بن جابر بن عبد الله، ثقة. انظر الكاشف للذهبي ترجمة 3162.

¹⁵² اسمه هاني بن دينار البلوي، حليف الأنصار، شهد بدرًا وما بعدها، توفي سنة 41، وقيل بعدها. انظر تهذيب

التهذيب لابن حجر: 4/485.

¹⁵³ صحيح. رواه أحمد: 3/466، 4/45، والبخاري في الحدود باب كم التعزيز والأدب ص 571 برقم 6850،

ومسلم في الحدود باب قدر أسواط التعزيز ص 980 برقم 1708.

وهو قول مالك.

وقال أبو حنيفة: نصابها دينار أو عشرة دراهم أو قيمتها.

وقال الشافعي: ربع دينار أو القيمة.

لنا:

[94] (خ، م) أيوب، عن نافع، عن ابن عمر: (أن رسول الله ﷺ قطع في مجن¹⁵⁵

ثن ثلاثة دراهم)¹⁵⁶.

[95] (خ، م) الزهري، عن عمرة¹⁵⁷، عن عائشة: (أن رسول الله ﷺ كان يقطع في

ربع دينار فصاعدا)¹⁵⁸.

¹⁵⁴ ضعيف. رواه البيهقي في السنن الكبرى: 327/8.

¹⁵⁵ هو الترس، وهو صفحة من الفولاذ مستديرة تحمل في اليد للوقاية من السيف ونحوه. النهاية 308/1، ومحيط المحيط لبطرس البستاني ص 69. طبع مكتبة لبنان 1983.

¹⁵⁶ صحيح. رواه أحمد: 6/2، 54، 64، 80، 82، 143، 145، والبخاري في الحدود باب قول الله تعالى (والسارق والسارقة فاقطعوا أيديهما) ص 567 برقم 6795، ومسلم في الحدود باب حد السرقة ونصابها ص 976 برقم 1686.

¹⁵⁷ عمرة بن عبد الرحمن بن سعد بن زرارة، من فقهاء التابعين، مات سنة 106، وقال ابن حبان: كانت أعلم الناس بحديث عائشة. انظر الكاشف للذهبي ترجمة 7046، وتهذيب التهذيب لابن حجر: 682/4-683.

¹⁵⁸ صحيح. رواه أحمد: 36/6، 163، 249، والبخاري في الحدود باب قول الله تعالى (والسارق والسارقة فاقطعوا أيديهما) ص 567 برقم 6790، ومسلم في الحدود باب حد السرقة ونصابها ص 976 برقم 1684.

[96] أحمد: نا هاشم¹⁵⁹، نا محمد بن راشد، عن يحيى بن يحيى الغساني¹⁶⁰، عن أبي

بكر بن حزم¹⁶¹، عن عمرة، عن عائشة قالت¹⁶²: (قال رسول الله ﷺ اقطعوا في

ربع الدينار، ولا تقطعوا فيما هو أدنى منه. قالت: وكان قيمته

يومئذ...¹⁶³ (¹⁶⁴).

احتجوا:

[97] بابن إسحاق، عن عمرو بن شعيب، عن أبيه، عن جده: (أن قيمة المجن كلن

على عهد رسول الله ﷺ عشرة دراهم)¹⁶⁵.

¹⁵⁹ هاشم بن القاسم، أبو النضر الحافظ، ثقة صاحب سنة تفتخر به بغداد، عاش 73 سنة، ومات سنة 207. انظر الكاشف للذهبي ترجمة 5931.

¹⁶⁰ سيد أهل الشام في زمانه، ولي قضاء الموصل لعمر بن عبد العزيز، قال ابن سعد: ثقة عالم بالفتيا والقضاء، مات سنة 135. انظر الكاشف للذهبي ترجمة 6265.

¹⁶¹ هو أبو بكر بن محمد بن عمرو بن حزم الأنصاري، ثقة عابد، مات سنة 120، وقيل غير ذلك. انظر تقريب التهذيب لابن حجر ترجمة 7988.

¹⁶² لوحة 158/أ.

¹⁶³ كلمة غير واضحة في الأصل، وفي المسند برقم (23994) "ثلاثة دراهم". وكذلك في تحقيق ابن الجوزي: 334/2، وتحقيق ابن عبد الهادي: 318/3.

¹⁶⁴ صحيح. رواه أحمد: 80/1.

¹⁶⁵ ضعيف. رواه أحمد: 180/2.

[98] سلم بن قتيبة¹⁶⁶، نا زفر بن الهذيل¹⁶⁷، نا حجاج بن أرطاة، عن عمرو، عن

أبيه، عن جده مرفوعاً: (لا يقطع السارق إلا في عشرة دراهم)¹⁶⁸.

[99] (س) الثوري، عن منصور، عن مجاهد¹⁶⁹، عن أيمن¹⁷⁰ قال: (لم تكن تقطع

اليد على عهد رسول الله ﷺ إلا في ثمن المجن، وقيمته يومئذ دينار)¹⁷¹.

قال الدارقطني: أيمن تابعي.

قال المؤلف¹⁷²: وابن إسحاق، وسلم، وحجاج ضعفاء.

[مسألة 42] يجب القطع على جاحد العارية

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- ¹⁶⁶ الشعيري الخراساني، ثقة بهم، توفي سنة 200. انظر الكاشف للذهبي ترجمة 2015.
- ¹⁶⁷ العنبري، الفقيه المجتهد، ولد سنة 110، قال الذهبي: هو من بحور الفقه وأذكياء الوقت، وقال ابن سعد: مات سنة 158. انظر سير أعلام النبلاء للذهبي: 41-38/8.
- ¹⁶⁸ ضعيف. رواه ابن شاهين في النسخ والنسخ برقم 609 ص 455.
- ¹⁶⁹ مجاهد بن جبر أبو الحجاج، مولى السائب بن أبي السائب المخزومي، حديثه عن عائشة في البخاري ومسلم وابن معين يقول لم يسمعها، إمام في القراءة والتفسير، حجة، مات سنة 101 وقيل بعدها، وعمره 83 سنة. انظر الكاشف للذهبي ترجمة 5289، وتقريب التقريب لابن حجر ترجمة 6481.
- ¹⁷⁰ مولى الزبير، وقيل: مولى ابن الزبير، قال النسائي: ما أحسب له صحة، وقال ابن عساكر في الأطراف: أيمن بن عبيد عن النبي صلى الله عليه وسلم حديث القطع في السرقة، هو أيمن بن أم أيمن، وقيل هو أيمن الحبشي والد عبد الواحد. وقال البخاري في تاريخه: أيمن الحبشي قال: يقطع السارق، مرسل. انظر تهذيب التهذيب لابن حجر: 699/1.
- ¹⁷¹ ضعيف. رواه النسائي في قطع السارق باب ذكر اختلاف أبي بكر بن محمد وعبد الله بن أبي بكر على عمرة في هذا الحديث ص 2407 برقم 4946.

خلافًا لأكثرهم.

[100] (م) الزهري، عن عروة، عن عائشة قالت: (كانت امرأة مخزومية

تستعير المتاع وتجحده، فأمر النبي ﷺ بقطع يدها، فأتى أهلها أسامة فكلموه،

فكلم أسامة رسول الله ﷺ فقال: يا أسامة، ألا أراك تكلمني في حد من حدود

الله، ثم قام خطب فقال: إنما هلك من كان قبلكم بأنه إذا سرق فيهم الشريف

تركوه، وإذا سرق فيهم الضعيف قطعوه، والذي نفسي بيده، لو كانت فاطمة

بنت محمد لقطعت يدها، فقطع يد المخزومية). تفرد به مسلم¹⁷³.

[101] قال عبد الرزاق: ونا معمر، عن أيوب، عن نافع، عن ابن عمر قال:

(كانت مخزومية تستعير المتاع وتجحده، فأمر النبي ﷺ بقطع يدها)¹⁷⁴.

[مسألة 43] إذا اشترك جماعة في سرقة نصاب قطعوا

¹⁷² يعني ابن الجوزي.

¹⁷³ صحيح. رواه مسلم في الحدود باب قطع السارق الشريف ص 976 برقم 1688. وأحمد: 162/6.

¹⁷⁴ صحيح. رواه أحمد 151/2.

وبه قال مالك. واشترط بأن يخرجوا النصاب¹⁷⁵ معا.

وقال أبو حنيفة والشافعي: لا قطع بحال.

[102] (خ، م) أبو صالح، عن أبي هريرة قال رسول الله ﷺ: (لعن الله السارق

يسرق البيضة فتقطع يده، ويسرق الحبل فتقطع يده)¹⁷⁶.

فهذا لا يصح إلا على قولنا وهو: أن يخرج كل واحد بيضة أو حبلا.

[مسألة 44] يجتمع الغرم¹⁷⁷ مع القطع

قال أبو حنيفة: القطع ينفي الضمان.

وقال مالك: إن كان السارق موسرا كمذهبنا¹⁷⁸، وإن كان معسرا كمذهبهم.

لنا:

¹⁷⁵ النصاب في اللغة الأصل والرجع، ونصاب السرقة هو المقدار الذي يجب بسرقة إقامة الحد. انظر لسان العرب 761/1.

¹⁷⁶ صحيح. رواه أحمد: 253/2، والبخاري في الحدود باب قول الله تعالى (والسارق والسارقة فاقطعوا أيديهما) ص 567 برقم 6799، ومسلم في الحدود باب حد السرقة ونصابها ص 976 برقم 1687.

¹⁷⁷ هو أداء الدية. محيط المحيط ص 657.

¹⁷⁸ لوحة 158/ب.

[103] قوله عليه السلام: (على اليد ما أخذت حتى¹⁷⁹ تؤديه)¹⁸⁰.

وقد مر في البيوع.

ولهم:

[104] سعيد بن عفير¹⁸¹، نا مفضل بن فضالة¹⁸²، عن يونس بن يزيد¹⁸³، عن

سعيد بن إبراهيم¹⁸⁴، عن أخيه مسور بن عبد الرحمن¹⁸⁵، عن عبد الرحمن بن

عوف قال: قال رسول الله ﷺ: (لا غرم على السارق بعد قطع يمينه)¹⁸⁶.

¹⁷⁹ في الأصل: "على".

¹⁸⁰ ضعيف. رواه أحمد: 8/5.

¹⁸¹ هو سعيد بن كثير بن عفير، أبو عثمان الأنصاري المصري الحافظ، قال أبو حاتم: صدوق وليس بالثبت، كان يقرأ من كتب الناس، توفي سنة 226، عن 80 سنة. انظر الكاشف للذهبي ترجمة 1947.

¹⁸² الإمام العلامة الحجة، قاضي مصر، وثقه ابن معين وغيره، وشذ محمد بن سعد فقال: منكر الحديث، ذكره ابن يونس في تاريخه فقال: كان من أهل الدين والورع والفضل، توفي سنة 181، وله 74 سنة. انظر سير أعلام النبلاء للذهبي 8/ 171-172.

¹⁸³ أحد الأثبات، توفي سنة 159. انظر الكاشف للذهبي ترجمة 6480.

¹⁸⁴ قال أبو صالح الحراني عبد الغفار بن داود، راوي الحديث عن المفضل، قلت للمفضل بن فضالة: يا أبا معاوية إنما هو سعد بن إبراهيم فقال هكذا حدثني أو قال في كتابي سعيد بن إبراهيم. قال الدارقطني: مجهول، والمسور بن إبراهيم لم يدرك عبد الرحمن بن عوف وإن صح إسناده كان مرسلًا والله أعلم. انظر سنن الدارقطني: 3/ 182. وقال الزيلعي: "ورواه الطبراني في معجمه الوسط قال: لا يروي عن عبد الرحمن بن عوف إلا بهذا الإسناد، وهو غير متصل، لأن المسور لم يسمع من جده عبد الرحمن. انتهى وقال عبد الحق في أحكامه: إسناده منقطع. وقال بن القطان في كتابه وفيه غير الإنقطاع بين المسور وجده عبد الرحمن بن عوف انقطاع آخر بين المفضل ويونس، فقد رواه إسحاق بن الفرات عن المفضل بن فضالة فجعل فيه الزهري بين يونس بن يزيد وسعد بن إبراهيم. قال: وفيه مع ذلك الجهل بحال المسور فإنه لا يعرف له حال. انتهى كلامه، وقال بن أبي حاتم في كتاب العلل: سألت أبي عن حديث رواه المفضل بن فضالة

سعيد قال الدارقطني مجهول، والمسور لم يدرك ابن عوف.

[مسألة 45] إذا ملك السارق العين المسروقة بوجه لا يسقط الحد

خلافاً لأبي حنيفة.

[105] محمد بن أبي حفصة¹⁸⁷، نا الزهري، عن صفوان بن عبد الله بن

صفوان¹⁸⁸، عن أبيه¹⁸⁹ أن صفوان بن أمية قال: (بينما أنا راقد إذ جاء سارق

عن يونس بن يزيد الأيلي عن سعد بن إبراهيم عن المسور بن إبراهيم عن عبد الرحمن بن عوف عن النبي صلى الله عليه وسلم قال: (لا يغرم السارق إذا أقيم عليه الحد) فقال أبي: هذا حديث منكر، ومسور لم يلق عبد الرحمن. انتهى وقلل البيهقي في كتاب المعرفة: هذا حديث رواه المفضل بن فضالة قاضي مصر واختلف عليه فيه فقلل عنه عن يونس بن يزيد عن سعد، وقيل عنه عن يونس عن الزهري عن سعد، وقيل عنه عن يونس عن سعد بن إبراهيم عن أخيه المسور، فإن كان سعد هذا هو ابن إبراهيم بن عبد الرحمن بن عوف فقال أهل العلم بالحديث لا نعرف له في التواريخ أخا معروفا بالرواية يقال له المسور، وإن كان غيره فلا نعرفه ولا نعرف أخاه. قال البيهقي: وقد رأيت حديثاً لسعد بن محمد بن المسور بن إبراهيم بن عبد الرحمن بن عوف فإن كان هذا الانتساب صحيحاً، وثبت كون المسور أخا لسعد بن إبراهيم فلم يثبت له سماع من جده عبد الرحمن ولا رؤية؛ وذلك لأن إبراهيم بن عبد الرحمن كان في خلافة عمر بن الخطاب صبيّاً صغيراً، ومات أبوه في خلافة عثمان، فإنما كان أدرك [يعني بلغ] أولاده بعد موت أبيه، وإنما رواية ابنه المعروفين صالح وسعد عن أبيهما عن عبد الرحمن فهذا الذي عرفناه بحديثه، وفيه نظر فلا يعرف له رؤية ولا رواية عن جده ولا عن غيره من الصحابة، فهو مع الجهالة منقطع، ويمثل هذه الرواية لا تترك أموال المسلمين تذهب باطلاً، وقد قال عليه السلام: (على اليد ما أخذت حتى تؤدي). انتهى كلامه بحروفه". انظر نصب الراية للزيلعي: 375/3-376.

¹⁸⁵ مسور بن إبراهيم بن عبد الرحمن بن عوف، مقبول، وروايته عن جده عبد الرحمن مرسلة، مات سنة 107. انظر

تقريب التهذيب لابن حجر ترجمة 6668.

¹⁸⁶ ضعيف. رواه الدارقطني: 182/3.

¹⁸⁷ أبو سلمة، وثقه غير واحد، وقال النسائي: ضعيف، ولينه القطان. انظر الكاشف للذهبي ترجمة 4804.

فأخذ ثوبي من تحت رأسي، فأدركته، فأتيت به النبي ﷺ، فأمر بقطعه، قلت: يا

رسول الله، ليس هذا أردت، هو عليه صدقة. قال: هلا قبل أن تأتيني به¹⁹⁰.

[106] وروى أبو داود¹⁹¹ من حديث عبد الله بن عمرو بن العاص أن رسول

الله ﷺ قال: (تعافوا¹⁹² الحدود فيما بينكم فما بلغني من حد فقد وجب)¹⁹³.

[مسألة 46] ويقطع النباش إذا بلغت قيمة الكفن نصاباً

خلافاً لأبي حنيفة.

[107] روى أصحابنا: (أنه عليه السلام قطع نباشاً¹⁹⁴).

¹⁸⁸ قال ابن حجر: كان من أشرف قريش في الجاهلية والإسلام، قيل إنه مات أيام مقتل عثمان، وقال المدائني: مات سنة 41، وقال خليفة بن خياط: سنة 42. انظر تهذيب التهذيب لابن حجر: 211/2-212.

¹⁸⁹ هو عبد الله بن صفوان، أحد الأشراف، قتل مع ابن الزبير. انظر الكاشف للذهبي ترجمة 2786.

¹⁹⁰ صحيح. رواه أحمد: 401/3.

¹⁹¹ في الحدود باب يعفى عن الحدود ما تبلغ السلطان ص 1542 برقم 4376.

¹⁹² أي تجاوزا عنها ولا ترفعوها إلي. النهاية لابن الأثير: 265/3.

¹⁹³ صحيح. رواه أبو داود برقم 3476 ص 1542.

¹⁹⁴ نبش القبر إذا كشفه وأخرج ما فيه. والنباش هو الذي يسرق الكفن من القبر. انظر الدر النقي: 755/3، ومحيط المحيط ص 875.

[108] إسرائيل، عن عبد الله بن المختار¹⁹⁵، عن معاوية بن قرة¹⁹⁶ قال:

يقطع¹⁹⁷.

[109] يونس¹⁹⁸، عن الحسن ومحمد¹⁹⁹ قالوا: يقطع النباش²⁰⁰.

[مسألة 47] إذا سرق في المرة الثالثة وما بعدها لم يقطع بل يحبس في أصح الروايتين

وهو قول أبي حنيفة.

وفي الأخرى: تقطع في الثالثة يده اليسرى، وفي الرابعة رجله اليمنى. وهو قول

مالك والشافعي.

[110] إسماعيل الشالنجي²⁰¹، نا محمد بن الحسين، عن أبي حنيفة، عن عمرو

بن مرة، عن عبد الله بن سلمة²⁰²، عن علي قال: (إذا سرق السارق قطعت يده

¹⁹⁵ قال ابن معين: ثقة. انظر الكاشف للذهبي ترجمة 2973.

¹⁹⁶ المزني البصري، عالم عامل، ولد يوم الجمل، ومات سنة 113. انظر الكاشف للذهبي ترجمة 5533.

¹⁹⁷ أورده ابن الجوزي من طريق أبي بكر الأثرم. وقد أخرجه ابن أبي شيبه في الحدود 530/6-531.

¹⁹⁸ هو يونس بن عبيد، أحد أئمة البصرة، من العلماء العاملين الأثبات، قال أحمد وابن معين والنسائي: ثقة، مات سنة

139. انظر تهذيب التهذيب لابن حجر: 4/470-472.

¹⁹⁹ الحسن هو البصري، ومحمد هو ابن سيرين، وقد تقدما.

اليمنى، فإن عاد قطعت رجله اليسرى، فإن عاد ضمن السجن حتى يحدث

خيراً، إني لأستحي أن أدعه يعيش بلا رجل ولا يد²⁰³.

احتجوا:

[111] يزيد بن سنان الرهاوي²⁰⁴، نا هشام بن عروة، عن ابن المنكدر²⁰⁵، عن

جابر: (أن رسول الله ﷺ أتى بسارق فقطع يده، ثم أتى به قد سرق فقطع رجله، ثم

أتى به قد سرق فقطع يده، ثم أتى به قد سرق فقطع رجله، ثم أتى به قد سرق فأمر به

فقتل²⁰⁶)²⁰⁷.

تفرد به محمد بن يزيد بن سنان، عن أبيه، وهو ضعيف.

²⁰⁰ أورده ابن الجوزي من طريق الأثرم.. "النباش يقطع". وانظر المغني لابن قدامة 272/8، وأحكام القرآن للحصاص

419/2، وتفسير القرطبي 171/6، وشرح السنة للبغوي 323/10.

²⁰¹ إسماعيل بن سعيد الشالنجي، من تلاميذ الإمام أحمد بن حنبل، وكان فقيهاً عالماً، مات سنة 230، وقيل 246.

انظر الجرح والتعديل لابن أبي حاتم: 173/2، وتاريخ بغداد: 351/6، وتاريخ جرجان لحزمة السهمي: ص 142.

²⁰² هو المرادي، قال الذهبي: صويلح، وقال ابن عدي: أرجو أنه لا بأس به، وقال البخاري: لا يتابع في حديثه. انظر

الكاشف للذهبي ترجمة 2760، وتهذيب التهذيب لابن حجر: 347/2-348.

²⁰³ صحيح. رواه الدارقطني: 103/3.

²⁰⁴ أبو فروة التميمي، ضعفه أحمد، مات سنة 155. انظر الكاشف للذهبي ترجمة 6315.

²⁰⁵ هو محمد بن المنكدر التيمي المدني، إمام، توفي سنة 130. انظر الكاشف للذهبي ترجمة 5171.

²⁰⁶ لوحة 159/أ.

[112] الدارقطني: نا محمد بن الحسن المقرئ²⁰⁸، نا أحمد بن العباس، نا إسماعيل بن

سعيد، نا الواقدي²⁰⁹، عن ابن أبي ذئب²¹⁰، عن خالد بن سلمة²¹¹، أراه عن أبي

سلمة²¹²، عن أبي هريرة مرفوعاً: (إذا سرق السارق فاقطعوا يده، فإن عاد فاقطعوا

رجله، فإن عاد فاقطعوا يده، فإن عاد فاقطعوا رجله)²¹³.

الواقدي هالك.

²⁰⁷ ضعيف. رواه الدارقطني: 180/3.

²⁰⁸ هو أبو بكر النقاش الموصلي البغدادي، أحد الأعلام، قال الذهبي: هو مع جلالة ونبله متروك الحديث، وقال البرقاني: كل حديثه منكر، وقال الخطيب البغدادي: في أحاديثه مناكير بأسانيد مشهورة، مات سنة 351. وانظر العليل للدارقطني: 187/5.

²⁰⁹ محمد بن عمر الواقدي قاضي العراق، قال البخاري وغيره متروك، مات في ذي الحجة سنة 207. انظر الكاشف للذهبي ترجمة 5078.

²¹⁰ هو محمد بن عبد الرحمن بن أبي ذئب، أبو الحارث العامري، كان ثقة كبير الشأن، توفي سنة 159. انظر الكاشف للذهبي ترجمة 5001.

²¹¹ المعروف بالفأفأ، وثقه أحمد وابن معين، وكان مرجحاً ينال من علي رضي الله عنه، قتل بواسط سنة 132. انظر سير أعلام النبلاء للذهبي: 373/5-374.

²¹² قال الإمام مالك بن أنس: كان عندنا رجال من أهل العلم اسم أحدهم كنيته منهم أبو سلمة، وقال أبو زرعة: ثقة إمام، اختلف في سنة وفاته. انظر تهذيب التهذيب لابن حجر: 531/4-532.

²¹³ ضعيف جداً. رواه الدارقطني: 181/3.

[113] خالد الحذاء²¹⁴، عن عكرمة، عن ابن عباس: (شهدت عمر قطع بعد يد

ورجل يدا)²¹⁵.

[مسألة 48] حد الزنى يسقط بالتوبة وكذا السرقة والشرب

وعنه: لا يسقط، كقول أبي حنيفة ومالك، وعن الشافعي كالمذهبيين.

[114] سلم بن سالم²¹⁶، ثنا سعيد الحمصي²¹⁷، عن عاصم الجذامي²¹⁸، عن

عطاء، عن ابن عباس قال رسول الله ﷺ: (التائب من الذنب كمن لا ذنب

له)²¹⁹.

قلت: إسناده مظلم.

²¹⁴ خالد بن مهران أبو المنازل البصري، ثقة حافظ إمام، توفي سنة 141. انظر الكاشف للذهبي ترجمة 1356.

²¹⁵ صحيح. رواه الدارقطني: 181/3.

²¹⁶ البلخي الزاهد، قال ابن سعد: كان مطاعاً أماراً بالمعروف، وكان مرجئاً ضعيفاً. وقال النسائي: ضعيف. وقال ابن معين: ليس بشيء. توفي سنة 194. انظر سير أعلام النبلاء: 321/9-322.

²¹⁷ قال الألباني: لم أعرفه، ويحتمل أن يكون سعيد بن سنان أبا مهدي الحمصي، وهو ضعيف جداً. انظر سلسلة الأحاديث الضعيفة والموضوعة حديث رقم 616.

²¹⁸ قال الذهبي: هو شيخ لبقية، لا يعرف. انظر ميزان الاعتدال: 72/3.

²¹⁹ ضعيف. رواه البيهقي في شعب الإيمان: 436/5.

[مسألة 49] المرتدة تقتل

خلافًا لأبي حنيفة.

[115] لقوله عليه السلام: (من بدل دينه فاقتلوه)²²⁰.

[116] معمر بن بكار السعدي²²¹، نا إبراهيم بن سعد²²²، عن الزهري، عن

محمد بن المنكدر، عن جابر: (أن امرأة يقال لها: أم رومان ارتدت عن الإسلام،

فأمر النبي ﷺ أن يعرض عليها الإسلام، فإن رجعت وإلا قتلت)²²³.

قلت: معمر لينه العقيلي.

[117] عن عبد الله بن أذينة²²⁴، عن هشام بن الغار²²⁵، عن ابن المنكدر، عن

جابر نحوه. وزاد:

²²⁰ صحيح. انظر حديث 50.

²²¹ قال أبو حاتم: مجهول. الجرح والتعديل: 69/9. وقال العقيلي: في حديثه وهم لا يتابع على أكثره. الضعفاء:

207/4. وذكره ابن حبان في الثقات. انظر ثقات ابن حبان: 169/9. وقال ابن حجر: صويلح. لسان الميزان: 66/6.

²²² أبو إسحاق العوفي الزهري، من كبار العلماء، مات سنة 183. انظر الكاشف للذهبي ترجمة 138.

²²³ ضعيف. رواه الدارقطني: 118/3.

²²⁴ عبد الله بن عطار بن أذينة، قال ابن حبان: لا يحتج به، وقال الذهبي: روى أحاديث لا يتابع عليها. انظر المغني في

الضعفاء للذهبي: 347/1.

(فأبت أن تسلم فقتلت)²²⁶.

[118] عن محمد بن عبد الملك الأنصاري²²⁷، عن الزهري، عن عروة، عن

عائشة قالت: (ارتدت امرأة يوم أحد، فأمر النبي ﷺ أن تستتاب)²²⁸. رواهم

الدارقطني.

قلت: لم يصح ذلك.

[119] عبد الله بن عيسى الخزري، نا عفان²²⁹، نا شعبة، عن عاصم²³⁰، عن

أبي رزين²³¹، عن ابن عباس قال رسول الله ﷺ: (لا تقتل المرأة إذا ارتدت)²³².

²²⁵ قال الذهبي: صدوق عابد توفي سنة 156. انظر الكاشف للذهبي ترجمة 5975. وقال ابن معين: ثقة، وذكره ابن

حبان في الثقات. انظر تهذيب التهذيب لابن حجر: 278/4.

²²⁶ ضعيف جدا. رواه الدارقطني: 119/3.

²²⁷ قال أحمد بن حنبل: كان يضع الحديث ويكذب، وقال أبو زرعة: مدين ضعيف الحديث. انظر الجرح والتعديل

لابن أبي حاتم: 4/8.

²²⁸ ضعيف جدا. رواه الدارقطني: 118/3.

²²⁹ عفان بن مسلم الصفار، أبو عثمان الحافظ، كان ثبتا في أحكام الجرح والتعديل، مات سنة 220. انظر الكاشف

للذهبي ترجمة 3827.

²³⁰ عاصم بن أبي النجود بمذلة الأسدي مولاهم المقرئ، وثق، وقال الدارقطني: في حفظه شيء، كات سنة 128.

انظر الكاشف للذهبي ترجمة 2496.

²³¹ مسعود بن مالك أبو رزين الأسدي، قال أبو زرعة والعجلي: كوفي ثقة، وذكره ابن حبان في الثقات، وقال ابن

قانع: توفي سنة 85. انظر تهذيب التهذيب لابن حجر: 64-63/4.

²³² موضوع. رواه الدارقطني: 117/3.

قال الدارقطني : الخزري كذاب.

الصول²³³

[مسألة 50] ما أتلفته البهائم نهارا فلا ضمان على صاحبها إذا لم يكن معها وما أتلفته

ليلا فضمانه عليه

وقال أبو حنيفة: لا يضمن إلا أن يكون معها قائد أو سائق أو راكب، أو يكون

قد أرسلها.

[120] أحمد : نا محمد بن مصعب²³⁴ ، نا الأوزاعي²³⁵ ، عن الزهري، عن حرام بن

محينة²³⁶ ، عن البراء : (أنه كانت له ناقة ضارية²³⁷ ، فدخلت حائطا²³⁸ فأفسدت

²³³ الصول والصيال هو الاستطالة والثوب على الغير بغير حق. انظر معجم مقاييس اللغة 3/322، والموسوعة الفقهية 103/28.

²³⁴ قال الذهبي: فيه ضعف مات سنة 208، أخرج له الترمذي وابن ماجه. انظر الكاشف للذهبي ترجمة 5156.

²³⁵ لوحة 159/ب.

²³⁶ قال الذهبي: ثقة. توفي سنة 113. انظر الكاشف للذهبي ترجمة 968.

²³⁷ هي المعتادة لرعي زروع الناس. النهاية 3/86.

²³⁸ هو البستان.

فيه، ففضى رسول الله ﷺ أن حفظ الحوائط بالنهار على أهلها، وأن حفظ الماشية

بالليل على أهلها، وأن ما أصابت الماشية بالليل فهو على أهلها²³⁹.

[مسألة 51] ما أتلفته البهيمة برجلها وصاحبها راكبها لا يضمه

وقال مالك: لا يضم، سواء أتلفت بيدها أو رجلها، إذا لم يكن من جهة من هو

معها سبب.

وقال الشافعي: يضم ما جنت بيدها ورجلها.

[121] (خ) همام، عن أبي هريرة، عن رسول الله ﷺ قال: (العجماء جبار²⁴⁰، والمعدن

جبار، والبئر جبار)²⁴¹.

[122] سفيان بن حسين²⁴²، عن الزهري، عن ابن المسيب، عن أبي هريرة، قال رسول

الله ﷺ: (الرجل جبار²⁴³ ²⁴⁴).

²³⁹ صحيح. رواه أحمد: 295/4.

²⁴⁰ الجبار الهدر، والعجماء الدابة. النهاية 236/1.

²⁴¹ صحيح. أخرجه أحمد: 318/2-319، والبخاري في الزكاة باب في الركاز الخمس ص 118 برقم 1499.

قال الدارقطني: لم يتابع عليه، وهو وهم. رواه أبو صالح²⁴⁵، والأعرج، وابن

سيرين، ومحمد بن زياد²⁴⁶، وغيرهم، ولم يذكروا "الرجل.."، وتفرد آدم²⁴⁷، عن شعبة،

عن محمد بن زياد، عن أبي هريرة، عن رسول الله ﷺ: (الرجل جبار).

العجماء: البهيمة.

وجبار: هدر.

[مسألة 52] إذا عض يد إنسان فانتزعها من فيه فسقطت أسنانه فلا ضمان عليه

وقال مالك: يضمن. لنا:

[123] (خ، م): شعبة، ناقتادة، سمعت زرارة، عن عمران بن الحصين قال: (قاتل

يعلى بن أمية رجلا فعض أحدهما يد صاحبه، فانتزع يده من فيه، فانتزع ثنيته،

²⁴² أبو محمد الواسطي، قال النسائي: ليس به بأس إلا في الزهري، وقال ابن سعد: ثقة بخطي كثيرا. انظر الكاشف للذهبي ترجمة 1990.

²⁴³ أي ما أصابت الدابة برجلها فلا ضمان على صاحبها. انظر النهاية: 205/2.

²⁴⁴ صحيح. رواه الدارقطني: 152/3.

²⁴⁵ هو ذكوان السمان تقدم في حديث 85.

²⁴⁶ القرشي الجمحي مولاهم، ثقة، أخرج له أصحاب الكتب الستة. انظر الكاشف للذهبي ترجمة 4854.

فأختصما إلى النبي ﷺ فقال: يعرض أحدكم أخاه كما يعرض الفحل! لا دية

له²⁴⁸.

[124] (خ، م) ابن جريج ، نا عطاء، أخبرني صفوان بن يعلى بن أمية، عن أبيه قال:

(قاتل أجيري رجلا فعرض يده، فنزعها من فيه، فأندر²⁴⁹ ثنيته²⁵⁰، فأتى النبي ﷺ

فأهدره وقال: فیدع يده في فيك تقضمها كما يقضمها الفحل؟!²⁵¹.

[مسألة 53] إذا اطلع في بيت إنسان على أهله فله أن يرمي عينه فإن فقأها فلا ضمان

عليه

وقال أبو حنيفة: يضمن.

²⁴⁷ آدم بن أبي إياس العسقلاني، قال أبو حاتم: ثقة مأمون متعبد من خيار عباد الله، مات سنة 221. انظر الكاشف للذهبي ترجمة 244.

²⁴⁸ صحيح. أخرجه أحمد: 427/4، والبخاري في الديات باب إذا عض رجلا فوقعت ثناياه ص 574 برقم 6892، ومسلم في القسامة باب الصائل على نفسه ص 973 برقم 1673.

²⁴⁹ أي أسقطها.

²⁵⁰ الثنايا هي الأضراس الأربعة التي في مقدم الفم ثنتان من فوق وثنتان من أسفل، واحدها ثنية. انظر محيط المحيط ص 86.

[125] (خ، م) الزهري، عن سهل بن سعد قال: (اطلع ر جل من جحر في حجرة

النبي ﷺ ، ومعه مدرى²⁵² يحك به رأسه فقال: لو أعلمك تنظر لطعنت به في

عينك، إنما جعل الاستئذان من أجل البصر)²⁵³.

[126] (خ، م) حماد بن زيد، عن عبيد الله بن أبي بكر، عن أنس: (أن رجلا اطلع من

بعض حجر النبي ﷺ²⁵⁴ فقام النبي ﷺ بمشقص²⁵⁵ أو مشاقص، فكأنني أنظر إليه

يختل²⁵⁶ الرجل ليطعنه)²⁵⁷.

²⁵¹ صحيح. رواه أحمد: 222/4، 224، والبخاري في الجهاد باب الأجير ص 239 برقم 2973، ومسلم في القسلة باب الصائل على نفسه ص 973 برقم 1674.

²⁵² المدرى، والمدرأة شيء يعمل من حديد أو خشب على شكل سن من أسنان المشط وأطول منه، وقال الليث: المدرأة حديدة يحك بها الرأس. انظر لسان العرب مادة (درى): 255/14.

²⁵³ صحيح. أخرجه أحمد: 330/5، 334-335، والبخاري في الديات باب من اطلع في بيت قوم ص 576 برقم 6901، ومسلم في الآداب باب تحريم النظر في بيت غيره ص 1062 برقم 2156.

²⁵⁴ لوحة 160/أ. وقد تكررت عبارة "النبي ﷺ".

²⁵⁵ سهم فيه نصل عريض. معجم مقاييس اللغة: 204/3.

²⁵⁶ أصل المختل الخداع، والمراد هنا أنه يداوره ويطلبه من حيث لا يشعر. انظر معجم مقاييس اللغة: 245/2، والنهاية لابن الأثير: 10/2.

²⁵⁷ صحيح. رواه البخاري في الديات باب من اطلع في بيت قوم ص 576 برقم 6900، ومسلم في الآداب باب تحريم النظر في بيت غيره ص 1062 برقم 2157.

[127] (خ، م) أبو الزناد، عن الأعرج، عن أبي هريرة قال: قال أبو القاسم عليه السلام: (لو أن

امراً اطلع عليك بغير إذن، فحذفته بحصاة ففقت عينه لم يكن عليك جناح)²⁵⁸.

[128] (م) سهيل، عن أبيه، عن أبي هريرة مرفوعاً: (من اطلع على قوم في بيتهم بغير

إذنهم فقد حل لهم أن يفقتوا عينه)²⁵⁹.

[129] قتادة، عن النضر بن أنس²⁶⁰، عن بشير بن نهيك²⁶¹، عن أبي هريرة أن النبي صلى الله عليه وسلم

قال: (من اطلع في بيت قوم بغير إذنهم ففقتوا عينه، فلا دية ولا قصاص). رواه

أحمد²⁶².

[مسألة 54] الختان واجب على الرجل وفي المرأة روايتان

وقال أبو حنيفة ومالك: لا يجب.

²⁵⁸ صحيح. رواه البخاري في الديات باب من اطلع في بيت قوم ص 576 برقم 6902، ومسلم في الآداب باب تحريم

النظر في بيت غيره ص 1062 برقم 2158.

²⁵⁹ صحيح. رواه أخرجه أحمد: 414/2، ومسلم في الآداب باب تحريم النظر في بيت غيره ص 1062 برقم 2158.

²⁶⁰ النضر بن أنس بن مالك، ثقة، أخرج له أصحاب الكتب الستة. انظر الكاشف للذهبي ترجمة 5828.

²⁶¹ قال الذهبي: ثقة، أخرج له أصحاب الكتب الستة. انظر الكاشف للذهبي ترجمة 613.

²⁶² صحيح. رواه أحمد: 266/2.

[130] (خ، م) أبو الزناد، عن الأعرج، عن أبي هريرة قال: قال رسول الله ﷺ: (اختتن

إبراهيم خليل الرحمن بعد ما أتت عليه ثمانون سنة)²⁶³.

[131] ابن جريج، أخبرت عن عثيم بن كليب²⁶⁴، عن أبيه، عن جده²⁶⁵: (أنه جاء

النبي ﷺ فقال: قد أسلمت، فقال: ألق عنك شعر الكفر. قال: وأخبرني آخر معه

أن النبي ﷺ قال لآخر: ألق عنك شعر الكفر واختن)²⁶⁶.

قلت: هذا منقطع.

[132] (س) عبد الرحمن بن إسحاق²⁶⁷، عن المقبري، عن أبي هريرة قال: قال رسول

الله ﷺ: (خمس من الفطرة²⁶⁸...) ²⁶⁹ فذكر منهن الختان.

²⁶³ صحيح. أخرجه أحمد: 322/2، والبخاري في أحاديث الأنبياء باب قوله تعالى (واتخذ الله إبراهيم خليلاً) ص 272

برقم 3356، ومسلم في الفضائل باب من فضائل إبراهيم عليه السلام ص 1094 برقم 2370.

²⁶⁴ هو عثيم بن كثير بن كليب الحضرمي ويقال الجهني، قال ابن القطان: هو وأبوه مجهولان. انظر تعجيل المنفعة لابن

حجر: 146/2.

²⁶⁵ كليب الحضرمي، صحابي له ثلاثة أحاديث. انظر تهذيب التهذيب لابن حجر: 475/3.

²⁶⁶ ضعيف. رواه أحمد: 415/3.

²⁶⁷ قال أبو داود: قدرني ثقة، وضعفه بعضهم، وقال البخاري: ليس ممن يعتمد في حفظه. انظر الكاشف للذهبي ترجمة

3138.

²⁶⁸ الفطرة لها معان منها: أصل الخلقة والجلبة، ومنها السنة، ومنها الإسلام. انظر النهاية: 457/3.

²⁶⁹ صحيح. رواه النسائي برقم 9، 10 ص 2087.

[133] حجاج بن أرطأة، عن أبي المليح بن أسامة²⁷⁰، عن أبيه²⁷¹: (أن رسول الله ﷺ

قال: الختان سنة للرجال، مكرومة للنساء)²⁷².

حجاج ضعيف.

²⁷⁰ قال الذهبي: ثقة، مات سنة 112، وقيل 108. انظر الكاشف للذهبي ترجمة 6855.

²⁷¹ أسامة بن عمير الهذلي، صحابي، أخرج له أصحاب السنن الأربعة. انظر الكاشف للذهبي ترجمة 266.

²⁷² ضعيف. رواه أحمد: 75/5.

السير¹

[مسألة 55] لا يُستعان في الحرب بكافرٍ

وقال أبو حنيفة والشافعي: يُستعان بهم.

وزاد الشافعي: إذا احتيج إليهم، وحسن رأيهم في المسلمين.

[134] أحمد: ثنا أبو المنذر² إسماعيل بن عمر، نا مالك، عن الفضيل بن أبي عبد الله³، عن

عبد الله بن نيار الأسلمي⁴، عن عروة، عن عائشة: (أن رجلاً تبع رسول الله ﷺ

فقال: أتبعك لأصيب معك، فقال رسول الله ﷺ: تؤمن بالله ورسوله؟ قال: لا.

¹ أصل السير جمع سيرة وهي الطريقة والمذهب، وفي الاصطلاح: المغازي وما يتعلق بها، لأنها تتعلق بمسائل سير الإمام لملاقاة العدو وما يتعلق بهذا السير من أحكام. انظر محيط المحيط: ص 445.

² إسماعيل بن عمر الواسطي، قال أبو حاتم: صدوق، وقال الخطيب: ثقة، وذكره ابن حبان في الثقات، وقال مات بعد المائتين. انظر تهذيب التهذيب لابن حجر: 161/1.

³ هو فضيل المهري، قال ابن معين: ثقة لا بأس به، وقال أبو حاتم: صدوق، وقال البزار: لا بأس به، وذكره ابن حبان في الثقات. انظر تهذيب التهذيب لابن حجر: 398/3.

⁴ قال الذهبي: ثقة أخرج له مسلم وأبو داود والترمذي والنسائي. انظر الكاشف للذهبي ترجمة 3026.

قال: فَإِنَّا لَا نَسْتَعِينُ بِمُشْرِكٍ. فقال في المَرَّةِ الثانية: تَوْمِنُ بِاللَّهِ⁵ وَرَسُولِهِ؟ قال: نَعَمْ.

قال: فَأَنْطَلِقُ. فَتَبِعَهُ⁶. رواه مسلم⁶.

[135] مُسْتَلِمُ بْنُ سَعِيدٍ⁷، نا حُبَيْبُ بْنُ عَبْدِ الرَّحْمَنِ⁸، عن أَبِيهِ⁹، عن جَدِّهِ¹⁰ قال:

(أَتَيْتُ رَسُولَ اللَّهِ ﷺ وَهُوَ يُرِيدُ غَزْوًا، أَنَا وَرَجُلٌ مِنْ قَوْمِي، وَلَمْ نُسَلِّمْ، فَقُلْنَا:

إِنَّا نَسْتَحْيِي أَنْ يَشْهَدَ قَوْمُنَا مَشْهَدًا لَا نَشْهَدُهُ مَعَهُمْ، قال: أَوْ أَسَلَمْتُمَا؟ قلنا: لا.

قال: فَإِنَّا لَا نَسْتَعِينُ بِالْمُشْرِكِينَ. فَأَسَلَمْنَا وَشَهِدْنَا مَعَهُ¹¹.

احتجوا:

⁵ لوحة 160/ب.

⁶ صحيح. رواه أحمد: 67/6-68، ومسلم في الجهاد باب كراهة الاستعانة في الغزو بكافر ص 1004 برقم 1817.

⁷ الثقفى الواسطي، قال أحمد: شيخ ثقة من أهل واسط، قليل الحديث، وقال ابن معين: صويلح، وذكره ابن حبان في الثقات وقال: ربما خالف. انظر تهذيب التهذيب لابن حجر: 56/4.

⁸ الخزرجي، قال عنه ابن سعد وابن معين والنسائي: ثقة، وقال أبو حاتم: صالح الحديث. انظر الجرح والتعديل لابن أبي حاتم: 387/3. وذكره ابن حبان في الثقات، وقال: مات سنة 132. انظر ثقات ابن حبان: 274/6، وتهذيب التهذيب لابن حجر: 540/1.

⁹ عبد الرحمن بن حبيب بن يساف الأنصاري، أورده ابن أبي حاتم 230/5 ولم يذكر فيه جرحاً ولا تعديلاً. وذكره ابن حبان في الطبقة الثالثة من ثقات التابعين. انظر تعجيل المنفعة لابن حجر: 794/1.

¹⁰ حبيب بن يساف بن عتبة الأنصاري، صحابي شهد بدرًا. انظر ترجمته في الإصابة لابن حجر: 261/2.

¹¹ صحيح. رواه أحمد: 454/3.

[136] ابنُ عِيْنَةَ، عن يَزِيدَ بنِ يَزِيدَ بنِ جَابِرٍ¹²، عن الزُّهْرِيِّ: (أَنَّ النَّبِيَّ ﷺ اسْتَعَانَ

بِنَاسٍ مِنَ الْيَهُودِ فِي حَرْبِهِ، فَأَسْهَمَ لَهُمْ)¹³.

[137] ابنُ الْمُبَارَكِ¹⁴، عن حَيَّوَةَ بنِ شُرَيْحٍ¹⁵، عن الزُّهْرِيِّ: (أَنَّ النَّبِيَّ ﷺ أُسْهِمَ لِيَهُودَ

غَزَوْ مَعَهُ مِثْلَ سِيْهَامِ الْمُسْلِمِينَ)¹⁶. رواه أبو داود في "المراسيل".

قلت: مراسيلُ الزُّهْرِيِّ ضَعِيفَةٌ.

[مسألة 56] لَا يُقْتَلُ الشَّيْخُ الْفَاقِي وَلَا رَاهِبٌ¹⁷ وَلَا زَمِنٌ¹⁸ وَلَا أَعْمَى إِلَّا أَنْ يَكُونَ لَهُمْ رَأْيٌ

وَنِكَايَةٌ¹⁹

خِلافًا لِقَوْلِ الشَّافِعِيِّ.

¹² قال الذهبي: ثقة صالح، مات سنة 133. انظر الكاشف للذهبي ترجمة 6367.

¹³ ضعيف. رواه أبو داود في المراسيل برقم 281 ص 224.

¹⁴ هو عبد الله بن المبارك بن واضح المروزي، شيخ خراسان، ولد سنة 118، وتوفي في رمضان سنة 181. انظر الكاشف للذهبي ترجمة 2941.

¹⁵ الحضرمي الحمصي، قال ابن معين وغيره: ثقة، توفي سنة 224. انظر الكاشف للذهبي ترجمة 1292.

¹⁶ ضعيف. رواه أبو داود في المراسيل برقم 282 ص 224.

¹⁷ هو العابد، وعند النصارى من اعتزل الناس إلى الأديرة منقطعاً للعبادة. انظر محيط المحيط ص 355.

¹⁸ هو المصاب بالزمانة وهي العاهة المستديمة أو الشلل. انظر الدر النقي: 608/3، 777، ومحيط المحيط ص 379.

¹⁹ هي فعل ما يكيد به للعدو. انظر الدر النقي: 770/3.

[138] الليث، عن نافع، أن ابنَ عمرَ أَخْبَرَهُ: (أنَّ امْرَأَةً وَجِدَتْ فِي بَعْضِ مَغَازِي

رَسُولِ اللَّهِ ﷺ [مقتولة]²⁰ فَأَنْكَرَ ذَلِكَ، وَهِيَ عَنْ قَتْلِ النِّسَاءِ وَالصِّبْيَانِ).

صَحَّحَهُ (ت)²¹.

[مسألة 57] إذا اسْتَوْلَى الْمُشْرِكُونَ عَلَى أَمْوَالٍ لَنَا لَمْ يَمْلِكُوهَا

وقال أبو حنيفة ومالك: يملكونها. لنا:

[139] (م) أيوب، عن أبي قلابة²²، عن أبي المهلب²³، عن عمران بن حصين قال:

(كانت العَضْبَاءُ لِرَجُلٍ مِنْ بَنِي عُقَيْلٍ، وَكَانَتْ مِنْ سَوَابِقِ الْحَاجِّ، فَأُسِرَ الرَّجُلُ،

وَأُخِذَتِ الْعَضْبَاءُ مَعَهُ، فَحَبَسَهَا رَسُولُ اللَّهِ ﷺ لِرَحْلِهِ، ثُمَّ إِنَّ الْمُشْرِكِينَ أَغَارُوا

عَلَى سَرْحِ الْمَدِينَةِ، وَكَانَتِ الْعَضْبَاءُ فِيهِ، وَأَسَرُوا امْرَأَةً مِنَ الْمُسْلِمِينَ، فَكَلَنُوا إِذَا

نَزَلُوا أَنَاخُوا إِلَيْهِمْ بِأَفْنِيَّتِهِمْ، فَقَامَتِ الْمَرْأَةُ ذَاتَ كَيْلَةٍ بَعْدَ مَا نَامُوا، فَجَعَلَتْ كُلَّمَا

²⁰ ليست في الأصل.

²¹ صحيح. رواه الترمذي في السير باب ما جاء في النهي عن قتل النساء والصبيان ص 1813 برقم 1569.

²² عبد الله بن زيد الجرهمي، من أئمة التابعين، هرب من القضاء، سكن داريا، وتوفي سنة 104، وقيل 107. انظر

الكاشف للذهبي ترجمة 2734.

أتت على بعير رغا، حتى أتت على العضباء، ناقة ذلول، فركبتها، ثم وجهتها
 قبل المدينة، ونذرت إن الله أنجاها عليها لتتحرنها، فلما قدمت المدينة، عرفت
 الناقة، وقيل: ناقة رسول الله ﷺ، فأخبر النبي ﷺ بنذرها، أو أتته فأخبرته،
 فقال: بنس ما جزتها إن الله نجاها عليها لتتحرنها، ثم قال: لا وفاء لنذر في
 معصية الله، ولا في ما لا يملك ابن آدم²⁴.

[140] (د) عبید الله²⁵، عن نافع، عن ابن عمر قال: (ذَهَبَ فَرَسٌ لَهُ فَأَخَذَهَا الْعَدُوُّ،

فَظَهَرَ عَلَيْهِمُ الْمُسْلِمُونَ، فَرَدُّ عَلَيْهِ فِي زَمَنِ رَسُولِ اللَّهِ ﷺ، وَأَبْقَى عَبْدٌ لَهُ فَلِحَقَّ
 بِالرَّوْمِ، فَظَهَرَ عَلَيْهِمُ الْمُسْلِمُونَ فَرَدُّ عَلَيْهِ خَالِدُ بْنُ الْوَلِيدِ بَعْدَ وَفَاةِ رَسُولِ اللَّهِ

ﷺ²⁶.

احتجوا بـ:

²³ أبو المهلب الجرمي، عم أبي قلابة، ثقة، أخرج له مسلم وأصحاب السنن. انظر الكاشف للذهبي ترجمة 6861.

²⁴ صحيح. أخرجه أحمد: 430/4، ومسلم في النذر باب لا وفاء لنذر في معصية الله ص 965 برقم 1641.

²⁵ لوحة 161/أ.

[141] الحسن بن عمار²⁷، عن عبد الملك²⁸، عن طاووس، عن ابن عباس، عن النبي

ﷺ: (فيما أحرز العدو، فاستنقذه المسلمون، إن وجدته صاحبه قبل أن يقسم

فهو أحق به، وإن وجدته قد قسم فإن شاء أخذه بالثمن)²⁹.

ابن عمار مترك.

[مسألة 58] إذا نازل الإمام حصناً لم يجز أن يفتح البثوق³⁰ ليغرقهم ولا يقطع أشجارهم إلا

بأحد شرطين: أحدهما أن يفعلوا بنا مثل ذلك أو يكون بنا حاجة إلى قطع ذلك

وجوزه الشافعي مطلقاً. روى أصحابنا:

[142] (أن النبي ﷺ كان إذا بعث جيشاً قال: لا تُغوروا³¹ عينا، ولا تعقروا شجراً

إلا شجراً منكم من القتال)³².

²⁶ صحيح. رواه أبو داود في الجهاد باب في المال يصيبه العدو من المسلمين ثم يدركه صاحبه في الغنيمـة ص 1423 برقم 2699.

²⁷ أبو محمد الكوفي الفقيه، ضعفه، مات سنة 153. انظر الكاشف للذهبي ترجمة 1051.

²⁸ عبد الملك بن ميسرة الكوفي، ثقة، أخرج له أصحاب الكتب الستة. انظر الكاشف للذهبي ترجمة 3486.

²⁹ ضعيف جداً. رواه الدارقطني: 114/4.

³⁰ يقال: بَثَقَ النهر إذا كسر شطه لينفجر الماء إلى ما حوله. انظر محيط المحيط ص 37.

احتجوا بحديث:

[143] نافع، عن ابن عمر: (أن رسول الله ﷺ حرق نخل بني النضير وقطع ، وهي

البويرة، فأنزل الله: {ما قطعتم من لينة³³ أو تركتموها قائمة على أصولها

فياذن الله} ³⁴.

[144] أحمد، نا وكيع، نا صالح بن أبي الأخضر³⁵، عن الزُّهري، عن عُرْوَةَ، عن

أسامة بن زيد قال: (بَعَثَنِي رَسُولُ اللَّهِ ﷺ إِلَى قَرْيَةٍ يُقَالُ لَهَا: أُبْنَى³⁶، فقال: ائْتِهَا

صباحاً ثُمَّ حَرَّقْ) ³⁷.

الْغَنِيمَةُ

³¹ الماء الغائر هو الذاهب في الأرض. انظر محيط المحيط ص671.

³² ضعيف. رواه البيهقي في السنن الكبرى: 90/9-91.

³³ اللينة هي النخلة، يقول تعالى: ما قطعتم من ألوان النخل أو تركتموها قائمة على أصولها فبأمر الله قطعتم ما قطعتم وتركتم ما تركتم ، وليغيظ بذلك أعداءه ، ولم يكن فساداً. انظر تفسير الطبري: 268/23-272.

³⁴ صحيح. رواه الترمذي برقم 1552 ص 811 رواه البخاري برقم 2326 ص 182، ومسلم برقم 1746 ص 987.

³⁵ البصري مولى بني أمية، لينة البخاري، وضعفه النسائي. انظر الكاشف للذهبي ترجمة 2325.

³⁶ على وزن جبلي، قرية بالشام، وقيل بموتة. انظر مراصد الاطلاع لعبد المؤمن بن عبد الحق البغدادي (ت739)

19/1 . تحقيق علي البجاوي طبع دار المعرفة بيروت 1954.

[مسألة 59] يُخَيَّرُ الْإِمَامُ فِي الْأَسْرَى بَيْنَ الْقَتْلِ وَالرَّقِّ وَالْفِدَاءِ وَالْمَنْ

وقال أبو حنيفة: لا يجوز الفداء³⁸ والمن³⁹.

لنا قوله تعالى: {فَإِذَا مَنَا بَعْدَ وَإِنَّا فِدَاءٌ}.

[145] الليث: حدثني المقبري، سمع أبا هريرة يقول: (بعث رسول الله ﷺ خيلاً قبل

نجد، فجاءت برجل من بني حنيفة يقال له: ثمامة بن أثال، سيد أهل اليمامة،

فربطوه بسارية، فخرج إليه رسول الله ﷺ فقال له: ما عندك يا ثمامة⁴⁰؟ قال:

عندي يا محمد خير، إن تقتل [تقتل]⁴¹ ذا دم⁴²، وإن تنعم تنعم على شاكر،

وإن كنت تريد المال فسل تعط منه ما شئت. فتركه رسول الله ﷺ حتى كان

³⁷ ضعيف. رواه أحمد: 205/5.

³⁸ هو إطلاق سراح الأسير مقابل مال أو نحوه.

³⁹ هو إطلاق سراح الأسير بلا مقابل.

⁴⁰ ومعنى قوله: "ماذا عندك" أي أي شيء عندك، ويحتمل أن تكون "ما" استفهامية، و"ذا" موصولة، "وعندك"

صلته، أي: ما الذي استقر في ظنك أن أفعله بك؟ فأجاب بأنه ظن خيراً فقال: عندي يا محمد خير. أي: لأنك لست

ممن يظلم، بل ممن يغفو ويحسن. انظر فتح الباري لابن حجر العسقلاني: 110/8.

⁴¹ ليست في الأصل. وهي في الصحيحين.

⁴² ومعنى قوله: "إن تقتلني تقتل ذا دم" أي: صاحب دم، لدمه موقع يشتهي قاتله بقتله، ويدرك ثأره، لرياسته وعظمته،

ويحتمل أن يكون المعنى: أنه عليه دم، وهو مطلوب به، فلا لوم عليك في قتله. وروي بالذال المعجمة "ذم" ومعناها ذا

الغد⁴³، فقال له: ما عندك يا ثُمَامَةُ؟ قال: ما قلتُ لك. فترَكه حتى كان بَعْدَ

الغدِ، فقال: ما عندك يا ثُمَامَةُ؟ فأعاد ذلك القول، فقال رسولُ الله ﷺ:

انْطَلِقُوا بِثُمَامَةَ، فانْطَلِقَ بِهِ إِلَى نَخْلٍ قَرِيبٍ مِنَ الْمَسْجِدِ، فَاغْتَسَلَ ثُمَّ دَخَلَ

المسجدَ فقال: أَشْهَدُ أَنْ لَا إِلَهَ إِلَّا اللَّهُ، وَأَشْهَدُ أَنَّ مُحَمَّدًا رَسُولُ اللَّهِ⁴⁴.

وقد مَنَّ النَّبِيُّ ﷺ عَلَى أَبِي عَزَّةَ الْجُمَحِيِّ⁴⁵.

وَفَدَى الْأَسَارَى يَوْمَ بَدْرٍ⁴⁶.

ذمة، وضعفها القاضي عياض لأنها تقلب المعنى، لأنه إذا كان ذا ذمة فلا يجوز قتله. قال النووي: يمكن تصحيحها بأن تحمل على الوجه الأول، والمراد بالذمة الحرمه في قومه. انظر فتح الباري لابن حجر العسقلاني: 110/8-111. ⁴³ لوحة 161/ب.

⁴⁴ صحيح. رواه أحمد: 246/2-247، والبخاري برقم 4372 ص 358، ومسلم برقم 1764 ص 991. ⁴⁵ روى الواقدي من طريق الزهري عن سعيد بن المسيب قال: "أمن رسول الله صلى الله عليه وسلم من الأسارى يوم بدر أبا عزة عبد الله بن عمرو بن عبد الجُمَحِيِّ، وكان شاعراً، وكان قال للنبي صلى الله عليه وسلم: يا محمد، إن لي خمس بنات ليس لهن شيء فتصدق بي عليهن، ففعل، وقال أبو عزة: أعطيك موثقاً أن لا أقاتلك، ولا أكره عليك أبداً. فأرسله رسول الله صلى الله عليه وسلم، فلما خرجت قريش إلى أحد جاءه صفوان بن أمية فقال: اخرج معنا! فقال: إني قد أعطيتُ محمدًا موثقاً أن لا أقاتله، فضمن صفوان أن جعل بناته مع بناته إن قُتل، وإن عاش أعطاه مالا كثيراً، فلم يزل به حتى خرج مع قريش يوم أحد فأسير، ولم يؤسر غيره من قريش، فقال: يا محمد، إنما أخرجتُ كُرْهًا، ولي بنات، فامنن علي! فقال رسول الله صلى الله عليه وسلم: "أين ما أعطيتني من العهد والميثاق؟ لا والله، لا تمسحُ عارضيكَ بمكة تقول سخرتُ محمدًا مرتين". قال سعيد بن المسيب: فقال النبي صلى الله عليه وسلم: "إن المؤمن لا يلدغ من حجر مرتين، يا عصام بن ثابت، قدمه فاضرب عنقه. فقدمه فاضرب عنقه". أخرجه البيهقي في السنن الكبرى: 65/9 من طريق الواقدي، وهو متروك. وانظر التلخيص الحبير لابن حجر: 108/4.

⁴⁶ انظر صحيح مسلم حديث رقم 1763.

[146] (د) عن أبي الشعثاء⁴⁷، عن ابن عباس: (أن رسول الله ﷺ جعل فداء أهل

الجاهلية يوم بدر، أربعمائة)⁴⁸.

[147] أحمد، نا علي بن عاصم⁴⁹، عن حميد، عن أنس قال: (استشار النبي ﷺ

الناس في الأسارى يوم بدر، فقال أبو بكر: نرى أن تغفو عنهم، وتقبل منهم

الفداء، فعفا عنهم، وقبل منهم الفداء)⁵⁰.

[148] (ت) أيوب، عن أبي قلابة، عن عمه، عن عمران: (أن النبي ﷺ فدى رجلا

من المشركين برجل)⁵¹.

[مسألة 60] السلب للقاتل

⁴⁷ اسمه جابر بن زيد الأزدي، صاحب ابن عباس، توفي سنة 93. انظر الكاشف للذهبي ترجمة 728.

⁴⁸ ضعيف. رواه أبو داود في الجهاد باب في فداء الأسير بالمال ص 1422 برقم 2691.

⁴⁹ علي بن عاصم بن صهيب الواسطي، ضعفه، كان عنده مائة ألف حديث، وعاش بضعا وتسعين سنة، ومات سنة

201، في جمادى الأولى. انظر الكاشف للذهبي ترجمة 3935.

⁵⁰ ضعيف. رواه أحمد: 243/3.

⁵¹ صحيح. وقد ورد نص الحديث هكذا في الأصل المخطوط، وكذلك في التحقيق لابن الجوزي: 346/2، بينما نص

الحديث في الترمذي: "أن النبي صلى الله عليه وسلم فدى رجلين من المسلمين برجل من المشركين من بني عقيل". سنن

الترمذي كتاب السير باب ما جاء في قتل الأسارى والفداء ص 1813 برقم 1568، ومسند أحمد: 426/4-427،

432.

وعنه: لا يستحقه إلا أن يشترط له ذلك.

وقال مالك: يستحق بالشرط، ويكون محسوباً من خمس الخمس.

[149] (خ، م) مالك، عن يحيى بن سعيد، عن عمر بن كثير بن أفلح⁵²، عن أبي

محمد مولى أبي قتادة⁵³، عن أبي قتادة⁵⁴ قال رسول الله ﷺ: (من قتل قتيلاً له

عليه بينة فله سلبه)⁵⁵.

[150] أحمد: نا أبو المغيرة⁵⁶، نا صفوان بن عمرو⁵⁷، نا عبد الرحمن بن جبير⁵⁸، عن

أبيه⁵⁹، عن عوف بن مالك، وخالد بن الوليد⁶⁰: (أن رسول الله ﷺ لم يخمس

السلب)⁶¹.

⁵² قال ابن سعد وعلي بن المديني والنسائي: ثقة. انظر تهذيب التهذيب لابن حجر: 249/3.

⁵³ اسمه نافع، قال الذهبي: ثقة. انظر الكاشف للذهبي ترجمة 5780.

⁵⁴ الحارث بن ربيعي، فارس النبي صلى الله عليه وسلم، في وفاته اختلاف. انظر الكاشف للذهبي ترجمة 6786.

⁵⁵ صحيح. وهو جزء من حديث طويل أخرجه البخاري في فرض الخمس باب من لم يخمس الأسلاب ص 253 برقم

3142، ومسلم في الجهاد باب استحقات القاتل سلب القتيل ص 988 برقم 1751.

⁵⁶ هو عبد القدوس بن الحجاج الخولاني الحمصي، ولد سنة 130، قال عنه العجلي: ثقة، وقال أبو حاتم: صدوق،

وقال النسائي: لا بأس به، وقال البخاري: مات سنة 212. انظر سير أعلام النبلاء للذهبي: 223/10-225.

⁵⁷ أبو عمرو السكسكي الحمصي، وثقه، مات سنة 155. انظر الكاشف للذهبي ترجمة 2402.

⁵⁸ عبد الرحمن بن جبير بن نفير الحضرمي، ثقة، مات سنة 118. انظر الكاشف للذهبي ترجمة 3164.

⁵⁹ جبير بن نفير الحضرمي، ثقة، مات سنة 75. انظر الكاشف للذهبي ترجمة 761.

[مسألة 61] يصح أمان العبد

وقال أبو حنيفة: لا ، إلا أن يأذن له السيد في القتال.

[151] الأعمش، عن إبراهيم التيمي⁶²، عن أبيه⁶³ قال: (خطبنا علي فقال: من زعم

أن عندنا شيئاً نقرؤه إلا كتاب الله ، وهذه الصحيفة، صحيفة فيها أسنان

الإبل، وأشياء من الجراحات، فقد كذب، وفيها: وذمة الله واحدة ، يسعى بها

أدناهم)⁶⁴.

[152] سليمان بن بلال⁶⁵، عن كثير بن زيد⁶⁶، عن الوليد بن رباح⁶⁷، عن أبي

هريرة، عن النبي ﷺ قال: (يجير على أمتي أدناهم). رواه أحمد⁶⁸.

⁶⁰ أبو سليمان المخزومي، سيف الله، أسلم قبل مؤنة بشهرين، وكان النصر على يده يومئذ، مات سنة 21. انظر

الكاشف للذهبي ترجمة 1360.

⁶¹ صحيح. رواه أحمد: 26/6.

⁶² قال ابن معين: ثقة، وقال أبو زرعة: ثقة مرجح، قتل سنة 92. انظر تهذيب الكمال للمزي: 59/1، والكاشف
ترجمة 220.

⁶³ يزيد بن شريك التيمي الكوفي، ثقة، ويقال إنه أدرك الجاهلية، مات في خلافة عبد الملك بن مروان. انظر الكاشف
للذهبي ترجمة 6317، والتقريب لابن حجر 1076.

⁶⁴ صحيح. رواه أحمد : 81/1.

⁶⁵ أبو محمد مولى آل الصديق، ثقة إمام، توفي سنة 172. انظر الكاشف للذهبي ترجمة 2073.

⁶⁶ أبو محمد الأسلمي المدني، صدوق فيه لين. انظر الكاشف للذهبي ترجمة 4631.

[153] (م) أبو صالح، عن أبي هريرة مرفوعا: (ذمة المسلمين واحدة، يسعى بها

أدناهم)⁶⁹.

[154] عاصم الأحول، عن فضيل بن زيد⁷⁰: (أن عبدا أمن قوما فأجازه عمر). رواه

سعيد في سننه⁷¹.

الخيـل⁷²

[مسألة 62] للفارس ثلاثة أسهم

وقال أبو حنيفة: سهمان.

⁶⁷ قال أبو حاتم: صالح، وقال البخاري: حسن الحديث، وذكره ابن حبان في الثقات، وأرخ وفاته سنة 117. انظر

تهديب التهذيب لابن حجر: 315/4.

⁶⁸ حسن. رواه أحمد من حديث أبي هريرة: 365/2.

⁶⁹ صحيح. رواه مسلم برقم 1371 ص 905.

⁷⁰ أبو حسان الرقاشي البصري، قال ابن معين: رجل صدق ثقة، مات سنة 95. انظر تعجيل المنفعة لابن حجر:

116/2.

⁷¹ صحيح. رواه سعيد بن منصور: 233/2 برقم 2609.

⁷² لوحة 1/162.

[155] ابن المبارك ، نا فليح بن محمد⁷³ ، عن المنذر بن الزبير⁷⁴ ، عن أبيه⁷⁵ : (أن النبي

ﷺ أعطى الزبير سهما، وفرسه سهمين)⁷⁶.

[156] محمد بن حمران⁷⁷ ، حدثني عبد الله بن بسر⁷⁸ ، عن أبي كبشة الأنماري⁷⁹

قال: (لما فتح رسول الله ﷺ مكة، كان الزبير على المجنبه اليسرى، وكان

المقداد على المجنبه⁸⁰ اليمنى، فلما دخل رسول الله ﷺ مكة، وهدا الناس، خلا

⁷³ هو فليح بن محمد بن المنذر بن الزبير بن العوام، أورده البخاري في التاريخ الكبير: 133/7 وقال: عن أبيه، مرسل. وأورده ابن أبي حاتم في الجرح والتعديل: 85/7 وسكت عنه، وذكره ابن حبان في الثقات: 11/9، وفي تعجيل المنفعة لابن حجر: 335/1 لا يكاد يعرف.

⁷⁴ الأمير أبو عثمان أحد الأبطال ولد زمن عمر، وكان ممن غزا القسطنطينية مع يزيد، وكان بالكوفة لما بلغه خلاف أخيه عبد الله بن الزبير على يزيد، فأسرع إلى أخيه بمكة في ثمان ليال، فلما حاصر الشاميون ابن الزبير سنة أربع وستين قتل تلك الأيام المنذر رحمه الله. انظر سير أعلام النبلاء للذهبي: 381/3.

⁷⁵ الزبير بن العوام الأسدي، حوارى رسول الله صلى الله عليه وسلم وابن عمته صفية، وابن أخي خديجة، وأول من سل سيفاً في سبيل الله، استشهد يوم الجمل سنة 36. انظر الكاشف للذهبي ترجمة 1626.

⁷⁶ منقطع. رواه أحمد: 18/3.

⁷⁷ محمد بن حمران بن عبد العزيز القيسي، أبو عبد الله البصري، قال أبو زرعة: محله الصدق، وقال أبو حاتم: صالح، وقال النسائي: ليس بالقوي، وذكره ابن حبان في الثقات وقال: يخطئ، وقال الذهبي: صالح الحديث. ميزان الاعتدال للذهبي: 125/6، وتهذيب التهذيب لابن حجر: 77/5.

⁷⁸ بالسين المهملة، الحبراني، ضعيف، كما في التقريب: 494.

⁷⁹ صحابي، مختلف في اسمه، فقيل سعيد بن عمر، وحزم الترمذي وأبو أحمد الحاكم بأن اسمه عمير بن سعد. انظر الإصابة في معرفة الصحابة لابن حجر: 283/7.

⁸⁰ جانب الجيش، وهما مجنبتان بمعنى ويسرى. انظر القاموس المحيط للفيروزآبادي مادة (جنب) ص 88.

بفرسيهما، فقام رسول الله ﷺ يمسح الغبار عنهما وقال: إني قد جعلت للفارس

سهمين، ولل فارس سهمًا، فمن نقصهما نقصه الله⁸¹.

قلت: عبد الله بن بسر، هو الحبراني، ضعفه، وقال النسائي: ليس بثقة.

[157] قيس بن الربيع⁸²، عن محمد بن علي⁸³، عن أبي حازم⁸⁴، عن أبي رهم قال:

(غزوت مع رسول الله ﷺ أنا وأخي، ومعنا فرسان، فأعطانا ستة أسهم). رواه

الدارقطني⁸⁵.

قلت: قيس ضعيف⁸⁶.

[158] أبو أسامة، نا عبيد الله، عن نافع، عن ابن عمر قال: (أسهم رسول الله ﷺ

للفرس سهمين، ولصاحبه سهمًا)⁸⁷.

⁸¹ ضعيف. رواه الدارقطني: 101/4.

⁸² أبو محمد الكوفي الأسدي، صدوق تغير لما كبر وأدخل عليه ابنه ما ليس من حديثه فحدث به، مات سنة بضع وستين ومائة. انظر تقريب التقریب لابن حجر ترجمة 5573.

⁸³ محمد بن علي السلمي كما في سنن الدارقطني، ولم أجد له ترجمة.

⁸⁴ اسمه دينار، وهو مولى لأبي رهم، قال ابن عبد البر: ثقة، وذكره ابن حبان في الثقات. انظر تهذيب التهذيب لابن

حجر: 319/6.

⁸⁵ ضعيف. أخرجه الدارقطني: 101/4.

فاحتجوا:

[159] أحمد، نا إسحاق بن عيسى⁸⁸، نا مجمع بن يعقوب⁸⁹، سمعت أبي⁹⁰ يحدث

عن عمه عبد الرحمن بن يزيد⁹¹، عن عمه مجمع بن جارية⁹² قال: (قسم رسول

الله ﷺ خير فأعطى الفارس سهمين، وأعطى الراجل سهمًا)⁹³.

قال أبو داود : فيه وهم.

[160] وابن نمير⁹⁴، نا عبيد الله، عن نافع، عن ابن عمر : (أن رسول الله ﷺ جعل

للفارس سهمين وللراجل سهمًا)⁹⁵.

⁸⁶ وقال في كتابه ميزان الاعتدال 477/5: "صدوق في نفسه، سيئ الحفظ" ثم نقل عن النسائي قوله فيه: متروك، وعن الدارقطني: ضعيف. وأن شعبة كان يثني عليه.

⁸⁷ صحيح. رواه الدارقطني: 102/4.

⁸⁸ إسحاق بن عيسى بن الطباع البغدادي، ثقة، توفي سنة 215. انظر الكاشف للذهبي ترجمة 314.

⁸⁹ قال الذهبي: وثق، وقال ابن حجر: صدوق. انظر الكاشف للذهبي ترجمة 5298. والتقريب ترجمة 6490.

⁹⁰ يعقوب بن مجمع الأنصاري، قال الذهبي: وثق، وقال ابن حجر: مقبول، يعني إذا توبع وإلا فلين الحديث. انظر الكاشف للذهبي ترجمة 6403، والتقريب لابن حجر ترجمة 7832.

⁹¹ قال الأعرج: ما رأيت رجلا بعد الصحابة أفضل منه، توفي سنة 93. انظر الكاشف للذهبي ترجمة 3343.

⁹² الأنصاري، أحد من جمع القرآن إلا يسيرا، كان بقي عليه سورتان حين قبض النبي صلى الله عليه وسلم. انظر الكاشف للذهبي ترجمة 5295.

⁹³ ضعيف. رواه أحمد: 420/3.

⁹⁴ عبد الله بن نمير الهمداني، أبو هشام، حجة، توفي سنة 199. انظر الكاشف للذهبي ترجمة 3024.

⁹⁵ ضعيف. رواه أحمد: 2/2.

رواه أبو بكر النيسابوري، عن الرمادي، عن أبي بكر بن أبي شيبة، عنه.

ثم قال: وهم ابن أبي شيبة، أو الرمادي؛ لأن أحمد بن حنبل، وعبد الرحمن بن

بشر، وغيرهما رووه عن ابن نمير بخلاف هذا.

قال: ورواه نعيم بن حماد، عن ابن المبارك، عن عبيد الله كابن أبي شيبة، فلعل

الوهم من نعيم⁹⁶.

[مسألة 63] يسهم لفرسين

وقال أكثرهم: لا يسهم لأكثر من واحد.

[161] سعيد بن منصور⁹⁷: نا ابن عياش، عن الأوزاعي: (أن رسول الله ﷺ كان

يسهم للخيل، وكان لا يسهم للرجل فوق فرسين، وإن كان معه

عشرة⁹⁸ أفراس⁹⁹).

⁹⁶ نقله الدارقطني في سننه: 106/4.

⁹⁷ أبو عثمان الخراساني، مصنف السنن، ثقة متفق عليه أثني عليه الإمام أحمد وغيره، توفي سنة 227. انظر تهذيب

التهذيب لابن حجر: 46-45/2.

⁹⁸ لوحة 162/ب.

[162] سعيد، نا فرج بن فضالة¹⁰⁰، نا الزبيدي¹⁰¹، عن الزهري: (أن عمر كتب

إلى أبي عبيدة: أن أسهم للفرس سهمين، وللفرسين أربعة أسهم، ولصاحبها

سهما، فذلك خمسة أسهم، وما كان فوق الفرسين فهو جنائب)¹⁰².

[مسألة 64] لا يفرق في السبي بين كل ذي رحم محرم

وقال أكثرهم : يجوز. مع اختلاف قولهم في البيع كما مر.

[163] وحديث: أبي موسى¹⁰³ : (لعن الله من فرق بين والدته وولدها)¹⁰⁴.

[مسألة 65] إذا عدم أبوا الطفل أو أحدهما حكم بإسلامه

خلافًا للأكثر.

⁹⁹ معضل. رواه سعيد بن منصور في سننه: 281/2.

¹⁰⁰ التنوخي الحمصي، قواه أحمد، وضعفه الدارقطني وغيره، مات سنة 176. انظر الكاشف للذهبي ترجمة 4446.

¹⁰¹ محمد بن الوليد الزبيدي، أبو الهذيل القاضي، حمصي ثبت، مات سنة 149. انظر الكاشف للذهبي ترجمة 5199.

¹⁰² ضعيف. رواه سعيد في سننه : 281/2.

¹⁰³ عبد الله بن قيس الأشعري، صحابي، ولي زبيد وعدن للنبي صلى الله عليه وسلم، وولي البصرة والكوفة والبصرة

لعمر بن الخطاب، توفي سنة 44. انظر الكاشف للذهبي ترجمة 2919.

¹⁰⁴ صحيح. رواه الدارقطني: 67/3.

[164] (خ، م) همام¹⁰⁵ ، عن أبي هريرة قال رسول الله ﷺ: (ما من مولود يولد إلا

على الفطرة، فأبواه يهودانه، وينصرانه)¹⁰⁶.

[مسألة 66] إذا غل أحرق رحله إلا السلاح والمصحف والحيوان

وقال أكثرهم: لا يجوز.

[165] الدراوردي، نا صالح بن محمد بن زائدة¹⁰⁷ ، عن سالم بن عبد الله¹⁰⁸ : (أنه

كان مع مسلمة في أرض الروم، فوجد في متاع رجل غلولا، فسأل سالما فقل:

حدثني عبد الله، عن عمر أن رسول الله ﷺ قال: من وجدتم في متاعه غلولا

¹⁰⁵ همام بن منبه الصنعاني، صدوق، توفي سنة 132. انظر الكاشف للذهبي ترجمة 5984.

¹⁰⁶ صحيح. أخرجه أحمد: 253/2 ، والبخاري في الجنايز باب إذا أسلم الصبي فمات ص 106 برقم 1359، ومسلم

في القدر باب معنى كل مولود يولد على الفطرة ص 1141 برقم 2658.

¹⁰⁷ أبو واقد الليثي، قال ابن معين وغيره: ليس بذلك، كان صاحب وغيره: ليس بذلك كان صاحب ليل وتأله وجهاد.

انظر الكاشف للذهبي ترجمة 2359.

¹⁰⁸ أحد فقهاء التابعين، توفي سنة 106. انظر الكاشف للذهبي ترجمة 1773.

فأحرقوه. قال: وأحسبه قال: واضربوه. قال: فأخرج متاعه إلى السوق فوجد

فيه مصحف، فسأل سالما فقال: بعه وتصدق بثمانه¹⁰⁹.

صالح ضعفه يحيى والدارقطني، وقال: لم يتابع عليه، ولا أصل له.

وقال أحمد: ما أرى بصالح بأسا.

[مسألة 67] هدايا الأمراء كبقية أموال الفياء لا يختصون بها

وعنه: يختصون . كقول أبي حنيفة.

[166] (خ، م) الزهري، عن عروة، عن أبي حميد الساعدي قال: (استعمل رسول

الله ﷺ رجلا يقال له: ابن اللتبية على صدقة فجاء فقال: هذا لكم ، وهذا

أهدي لي¹¹⁰ . أفلا جلس في بيت أبيه وأمه فينظر أيهدى إليه أم لا! والذي

¹⁰⁹ ضعيف. رواه أحمد في المسند: 218/1 برقم 144 تحقيق أحمد شاكر.

¹¹⁰ كتبت في هامش الأصل: "سقط".

وهو كذلك ، فقد سقط منه: (فقام رسول الله ﷺ على المنبر فقال: ما بال العامل نبعثه فيجيء فيقول هذا لكم وهذا أهدي لي..). لفظ أحمد في المسند برقم 23087.

نفسى بيده ، لا يأتى أحد منكم منها بشيء إلا جاء به يوم القيامة على

رقبته¹¹¹.

[167] أحمد، ثنا إسحاق بن عيسى، نا إسماعيل بن عياش، عن يحيى بن سعيد، عن

عروة بن أبي حميد الساعدي: أن رسول الله¹¹² ﷺ قال: (هدايا العمال

غلول)¹¹³.

[168] ويروى عن ابن عباس مرفوعا: (هدايا الأمراء غلول).

الأراضي

[مسألة 68] مكة فتحت عنوة

وعنه: صلحا كقول الشافعي.

¹¹¹ صحيح. أخرجه أحمد: 423/5 ، والبخاري في الأحكام باب هدايا العمال ص 598 برقم 7174، ومسلم في

الإمارة باب تحريم هدايا العمال ص 1007 برقم 1832.

¹¹² لوحة 163/أ.

¹¹³ صحيح. رواه أحمد: 424/5.

[169] لنا: (خ، م) الليث، عن المقبري، عن أبي شريح، عن النبي ﷺ أنه قال من الغد

من يوم فتح مكة: (إن مكة حرمها الله، ولم يحرمها الناس، فلا يحل لامرئ

يؤمن بالله واليوم الآخر أن يسفك فيها دما، ولا يعضد بها شجرة، فإن أحد

ترخص لقتال رسول الله ﷺ فقولوا: إن الله أذن لرسوله، ولم يأذن لكم، وإنما

أذن لي فيها ساعة من نهار، وقد عادت حرمتها اليوم كحرمتها بالأمس، فليبلغ

الشاهد الغائب¹¹⁴.

[170] (خ، م) الأوزاعي، حدثني يحيى، نا أبو سلمة، حدثني أبو هريرة، عن النبي

ﷺ قال: (إن الله حبس عن مكة الفيل، وسلط عليها رسوله والمؤمنين، وإنما لا

تحل لأحد من بعدي وإنما أحلت لي ساعة من نهار)¹¹⁵.

¹¹⁴ صحيح. رواه أحمد: 385/6، والبخاري في جزاء الصيد باب لا يعضد شجر الحرم ص 143 برقم 1832، ومسلم

في الحج باب تحريم مكة ص 903 برقم 1354.

¹¹⁵ صحيح. أخرجه البخاري في اللقطة باب كيف تعرف لقطة أهل مكة ص 191 برقم 2434، ومسلم في الحج بلب

تحريم مكة ص 904 برقم 1355.

[171] (م) سليمانُ بنُ المُغيرة¹¹⁶، عن ثابت¹¹⁷، نا عبدُ الله بنُ رباح¹¹⁸، عن أبي

هُريرة: أَنَّهُ ذَكَرَ فَتَحَ مَكَّةَ فَقَالَ: (أَقْبَلَ النَّبِيُّ ﷺ فَدَخَلَ مَكَّةَ، فَبَعَثَ الزُّبَيْرَ عَلَى

أَحَدِ الْمُجَنَّبَيْنِ، وَبَعَثَ خَالِدًا عَلَى الْمُجَنَّبَةِ الْأُخْرَى، وَبَعَثَ أَبَا عُيَيْدَةَ عَلَى

الْحُسْرِ¹¹⁹، فَأَخَذُوا بَطْنَ الْوَادِي، وَرَسُولُ اللَّهِ ﷺ فِي كَتِيبَتِهِ، وَقَدْ وَبَّشَتْ قُرَيْشٌ

أَوْبَاشَهَا، وَقَالُوا: نُقَدِّمُ هَؤُلَاءِ، فَإِنْ كَانَ لَهُمْ شَيْءٌ كُنَّا مَعَهُمْ، وَإِنْ أُصِيبُوا أُعْطِينَا

الَّذِي سُلِّنَا. قَالَ أَبُو هُرَيْرَةَ: فَفَطِنَ، فَقَالَ لِي: يَا أَبَا هُرَيْرَةَ، قُلْتُ: لَبَّيْكَ رَسُولَ

اللَّهِ، قَالَ: اهْتِفْ لِي بِالْأَنْصَارِ، وَلَا يَأْتِينِي إِلَّا أَنْصَارِي، فَهَتَفْتُ بِهِمْ فَجَاءُوا،

فَأُطَافُوا بِهِ، فَقَالَ: تَرَوْنَ إِلَى أَوْبَاشِ¹²⁰ قُرَيْشٍ وَأَتْبَاعِهِمْ؟ ثُمَّ قَالَ بِيَدَيْهِ إِحْدَاهُمَا

عَلَى الْأُخْرَى: احْصُدُوهُمْ حَصْدًا حَتَّى تَوَافُونِي بِالصَّفَا. قَالَ أَبُو هُرَيْرَةَ:

¹¹⁶ أبو سعيد البصري، قال أحمد: ثبت، توفي سنة 165. انظر الكاشف للذهبي ترجمة 2129.

¹¹⁷ ثابت بن أسلم البُنانِي، كان رأساً في العلم والعمل، عاش 86 سنة، ومات سنة 127. انظر الكاشف للذهبي ترجمة

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¹¹⁸ عبد الله بن رباح الأنصاري، أبو خالد المدني، سكن البصرة، ثقة، قتلته الأزارقة [فرقة من الخوارج]. انظر تقريب

التقريب لابن حجر ترجمة 3307.

¹¹⁹ جمع حاسر: وهو من لا درع له ولا مغفر.

¹²⁰ الأخلاط والسُّفلة وغوغاء الناس. انظر القاموس المحيط للفيروزآبادي مادة (وبش) و (سفل) ص 785 ص 1312.

فأُطْلِقْنَا¹²¹ فما يشاءُ أحدٌ مِنَّا أن يُقْتَلَ منهم ما شاءَ، فقال أبو سفيان: أُبَيِّحَتْ
 خَضْرَاءُ قُرَيْشٍ، لا قُرَيْشَ بَعْدَ الْيَوْمِ، فقال رسولُ الله ﷺ: مَنْ أَعْلَقَ بَابَهُ فَهُوَ
 آمِنٌ، وَمَنْ دَخَلَ دَارَ أَبِي سُفْيَانَ فَهُوَ آمِنٌ، فَعَلَّقَ النَّاسُ أَبْوَابَهُمْ، فَأَقْبَلَ رَسُولُ
 اللَّهِ ﷺ إِلَى الْحَجَرِ فَاسْتَلَمَهُ، ثُمَّ طَافَ بِالْبَيْتِ، وَفِي يَدِهِ قَوْسٌ آخِذٌ بِسَيْتِهِ، فَأَتَى فِي
 طَوَافِهِ عَلَى صَنْمٍ إِلَى جَنْبِ الْبَيْتِ يَعْبُدُونَهُ، فَجَعَلَ يَطْعُنُ بِهَا فِي عَيْنِهِ وَيَقُولُ: جَاءَ
 الْحَقُّ وَزَهَقَ الْبَاطِلُ، ثُمَّ أَتَى الصَّفا فَعَلَاهُ حَيْثُ يَنْظُرُ إِلَى الْبَيْتِ، فَرَفَعَ يَدَيْهِ فَجَعَلَ
 يَذْكُرُ اللَّهَ بِمَا شَاءَ أَنْ يَذْكُرَهُ وَيَدْعُوهُ¹²².

[172] محمد بنُ الحسنِ بنِ زَبَّالَةَ¹²³، نا مالكٌ، عن هِشَامٍ، عن أَبِيهِ، عن عائِشَةَ قال

رسولُ الله ﷺ: (فُتِحَتِ الْقُرَى بِالسَّيْفِ، وَفُتِحَتِ الْمَدِينَةُ بِالْقُرْآنِ)¹²⁴.

¹²¹ لوحة 163/ب.

¹²² صحيح. أحمد: 538/2، ومسلم في الجهاد ص 995 برقم 1780.

¹²³ قال البخاري: عنده مناكير، وقال أبو زرعة: كان يسرق الحديث، وقال النسائي: متروك، ليس بثقة. انظر تهذيب

التهذيب لابن حجر 3/540-541.

¹²⁴ ضعيف جداً. رواه ابن عدي في الكامل: 810/6.

قال أحمد: هذا حديثٌ مُنكَرٌ، إنما هذا من قولِ مالكٍ، وقد رأيتَ هذا الشَّيْخَ —

يعني: ابنَ زَبَالَةَ — وكان كذاباً.

[مسألة 69] يجوزُ بَيْعُ رِباعِ مَكَّةَ

كقولِ الشافعيِّ.

وعنه : لا.

وهذا مَبْنِيٌّ على الصُّلْحِ والعُنُودِ؛ فإن قلنا: فُتِحَتْ عُنُودُ صَارَتْ وَقْفاً على المسلمين،

وإن قلنا: صُلْحاً فهي باقيةٌ على أهلها.

[مسألة 70] إذا مَلَكَتِ الأَرْضُ عُنُوداً فالإمامُ مُخَيَّرٌ بَيْنَ قِسْمَتِهَا بَيْنَ الغانمينَ وَبَيْنَ وَقْفِئِهَا

وعنه: يَجِبُ قِسْمُهَا كقولِ مالكٍ.

وقال أبو حنيفة: يُخَيَّرُ بَيْنَ قِسْمَتِهَا، وَبَيْنَ إِقْرَارِهَا على أهلها بالخراج، وَبَيْنَ صَرْفِهِم

عنها وَيَأْتِي بِقَوْمٍ آخَرِينَ يَضْرِبُ عَلَيْهِمُ الخراجَ، وليسَ له أَنْ يَقِفَهَا.

[173] (د) أسدُ بنُ موسى¹²⁵، نا يحيى بنُ زكريّا¹²⁶، عن سفيان، عن يحيى بن سعيّد

، عن بشير بن يسار، عن سهل بن أبي حثمة قال: (قَسَمَ رسولُ الله ﷺ خَيْبَرَ

نِصْفَيْنِ: نِصْفٌ لِتَوَائِبِهِ وَحَاجَتِهِ، وَنِصْفٌ بَيْنَ الْمُسْلِمِينَ قَسَمَهَا بَيْنَهُمْ عَلَى ثَمَانِيَةِ

عَشَرَ سَهْمًا)¹²⁷.

[مسألة 71] يجوزُ إخراجُ الثَّقَلِ مِنْ أَرْبَعَةِ أَخْمَاسِ الْغَنِيمَةِ

وقال مالكٌ والشافعيُّ: يكونُ من خُمْسِ الْخُمْسِ الَّذِي لِلْمَصَالِحِ.

[174] (خ، م) أيوبُ، عن نافع، عن ابنِ عمرَ: (أَنَّ رسولَ الله ﷺ بَعَثَ سَرِيَّةً إِلَى

نَجْدٍ، قَبَلَعَتْ سِهَامُهُمْ اثْنِي عَشَرَ بَعِيرًا، وَنَفَّلْنَا رسولُ الله ﷺ بَعِيرًا بَعِيرًا)¹²⁸.

¹²⁵ ويقال له أسد السنة، وهو أسد بن موسى بن إبراهيم بن الوليد بن عبد الملك بن مروان الأموي، قال النسائي:

ثقة، مات سنة 212. انظر الكاشف للذهبي ترجمة 334.

¹²⁶ يحيى بن زكريا بن أبي زائدة الحمداني، أبو سعيد الكوفي، ثقة متقن، مات سنة 184 وله 63 سنة. انظر تقريب

التهذيب لابن حجر ترجمة 7548.

¹²⁷ صحيح. رواه أبو داود في الخراج باب ما جاء في حكم أرض خيبر ص 1449-1450 برقم 3010.

¹²⁸ صحيح. أخرجه أحمد: 10/2، والبخاري في المغازي باب السرية التي قبل نجد ص 335 برقم 4338، ومسلم في

الجهاد باب الأنفال ص 987 برقم 1749.

[175] العلاء بن الحارث، عن ¹²⁹ مكحول، عن زياد بن جارية ¹³⁰، عن حبيب بن

مسلمة ¹³¹: (أن رسول الله ﷺ نفل الربع بعد الخمس في بدأته، ونفل الثلث بعد

الخمس في رجعته) ¹³².

[مسألة 72] ما فضل من مال الفيء عن المصالح فإنه لجميع الأمة غنيهم وفقيرهم

وقال الشافعي: يختص بالمصالح.

[176] الزهري، عن مالك بن أوس بن الحدثان ¹³³ قال: قال عمر: (إن الله خص نبيه

من هذا الفيء بشيء لم يعطه غيره فقال: {ما أفاء الله على رسوله منهم فما

أوجفتم عليه من خيل ولا ركاب} فكانت لرسول الله ﷺ خاصة، والله ما

¹²⁹ لوحة 164/أ.

¹³⁰ نزيل دمشق، قيل له صحبة، أنكر تأخير الجمعة إلى العصر فقتل وذلك زمن الوليد. انظر الكاشف للذهبي ترجمة

1673.

¹³¹ حبيب بن مسلمة بن مالك القرشي، نزيل الشام، وكان يسمى حبيب الروم لكثرة دخوله عليهم مجاهدا، مختلف في صحبته، والراجح ثبوته، لكنه كان صغيرا، مات بأرمينية أميرا عليها لمعاوية سنة 42. انظر تقريب التهذيب لابن حجر

ترجمة 1106.

¹³² صحيح. رواه أحمد: 160/4 برقم 17011.

¹³³ أبو سعيد، ثقة، قال ابن حبان: من زعم أن له صحبة فقد وهم. انظر التهذيب لابن حجر: 9/4.

استأثر بها عليكم، ولا اختازها دونكم، وكان يُنفق على أهله منه سنة، ثم

يَجْعَلُ ما بَقِيَ مِنْهُ مَجْعَلَ مالِ اللَّهِ عَزَّ وَجَلَّ¹³⁴.

وجهُ الحجَّةِ أن الآياتِ استوعبتْ كلَّ الناسِ.

الجزية

[مسألة 73] المجوسُ لا كتابَ لهم

خلافًا لأحدِ قولَي الشافعيِّ.

[177] (د) محمد بن بلال¹³⁵، عن عمران القطان¹³⁶، عن أبي جَمْرَةَ¹³⁷، عن ابنِ

عباسٍ قال: (إنَّ أَهْلَ فَارِسٍ لما ماتَ نَبِيُّهُمْ كَتَبَ لَهُمُ إبْلِيسُ المَجُوسِيَّةَ)¹³⁸.

¹³⁴ صحيح. رواه أحمد: 25/1.

¹³⁵ قال ابن عدي: يغرب عن عمران، وله عن غيره أحاديث غرائب وليس بالكثير، وأرجو أنه لا بأس

¹³⁶ قال أحمد: أرجو أن يكون صالح الحديث، وقال النسائي: ضعيف، وقال الدارقطني: كان كثير الوهم والمخالفة.

انظر تهذيب التهذيب لابن حجر: 318/3-319.

¹³⁷ مشهور بكنيته، واسمه نصر بن عمران الضبيعي، ثقة، توفي سنة 128. انظر الكاشف للذهبي ترجمة 5821.

¹³⁸ حسن. رواه أبو داود في سننه، كتاب الخراج والإمارة باب في أخذ أموال الجزية من المجوس ص 1452 برقم

[178] الشافعي: نا سفيان، عن سعيد بن المرزبان¹³⁹، عن نصر بن عاصم¹⁴⁰ قال:

(قال فروة بن نوفل: على ما تؤخذ الجزية من المجوس وليسوا بأهل كتاب؟

فقام إليه المستورد فأخذ بلبيه¹⁴¹، وقال: يا عدو الله، تطعن على أبي بكر،

وعمر، وعليّ وقد أخذوا منهم الجزية؟! فذهب به إلى القصر، فخرج عليهم

عليّ فقال: اتّيدا، أنا أعلم الناس بالمجوس، كان لهم علم يعلمونه، وكتاب

يُدرّسونه، وإنّ ملكهم سكر، فوقع على ابنته، أو أمّه، فاطلع عليه بعض أهل

مملكته، فلما صحا جاءوا يُقيمون عليه الحدّ، فامتنع منهم، فدعا أهل مملكته

فقال: تعلّمون ديناً خيراً من دين آدم؟ قد كان آدم يُنكحُ بنيه من بناته، فأنا

على دين آدم، وما يرغبُ بكم عن دينه؟ فتابعوه، وقاتلوا من خالفهم حتى

قتلوه، فأصبّحوا وقد أُسري على كتابهم، فرفع وذُهب العلم الذي في

¹³⁹ أبو سعد البقال، قال أحمد: منكر الحديث، مات مع الأعمش. انظر الكاشف للذهبي ترجمة 1954. وقال ابن

حجر: ضعيف مدلس، مات بعد سنة 140. انظر تقريب التهذيب لابن حجر ترجمة 2389.

¹⁴⁰ نصر بن عاصم الليثي النحوي، ثقة نقط المصاحف. انظر الكاشف للذهبي ترجمة 5812.

¹⁴¹ اللب: المنحر من كل شيء. والمعنى أخذ بعنقه.

صُدُّورِهِمْ، وَهُمْ أَهْلٌ¹⁴² كِتَابٍ، وَقَدْ أَخَذَ¹⁴³ رَسُولُ اللَّهِ ﷺ، وَأَبُو بَكْرٍ، وَعَمْرُ

مِنْهُمْ الْجَزِيَّةَ¹⁴⁴ (145).

سَعِيدٌ ضَعُفَ.

[179] مَالِكٌ، عَنْ جَعْفَرِ بْنِ مُحَمَّدٍ¹⁴⁶، عَنْ أَبِيهِ¹⁴⁷: أَنَّ عَمْرَ بْنَ الْخَطَّابِ ذَكَرَ الْمَجُوسَ

فَقَالَ: (مَا أَذْرِي مَا أَصْنَعُ فِي أَمْرِهِمْ. فَقَالَ لَهُ عَبْدُ الرَّحْمَنِ بْنُ عَوْفٍ: أَشْهَدُ

لَسَمِعْتُ رَسُولَ اللَّهِ ﷺ يَقُولُ: سُنُّوا بِهِمْ سُنَّةَ أَهْلِ الْكِتَابِ)¹⁴⁸.

[180] ابْنُ عُيَيْنَةَ، عَنْ عَمْرِو سَمِعَ بِجَالَةَ¹⁴⁹ يَقُولُ: (لَمْ يَكُنْ عَمْرُ قَبْلَ الْجَزِيَّةِ مِنْ

الْمَجُوسِ حَتَّى شَهِدَ ابْنُ عَوْفٍ أَنَّ رَسُولَ اللَّهِ ﷺ أَخَذَهَا مِنْ مَجُوسِ هَجَرَ)¹⁵⁰.

¹⁴² في الأصل: "أخذ".

¹⁴³ في الأصل: "أهل". وقد وقع الإبدال بينها وبين "أخذ" في الموضع السابق.

¹⁴⁴ لوحة 164/ب.

¹⁴⁵ ضعيف. رواه الشافعي كما في بدائع المنن في ترتيب مسند الشافعي والسنن للساعاتي: 35/2 برقم 1185.

¹⁴⁶ المعروف بجعفر الصادق، أبو عبد الله، قال ابن معين ثقة، وقال أبو حنيفة: ما رأيت أفقه منه، مات سنة 148 وعمره 68 سنة. انظر الكاشف للذهبي ترجمة 798.

¹⁴⁷ محمد بن علي الباقر، ولد سنة 56 ومات سنة 118 على الأصح. انظر الكاشف للذهبي ترجمة 5060.

¹⁴⁸ منقطع. رواه مالك في الموطأ برقم 43 ص 107 بترجمة عائشة بيولي.

¹⁴⁹ بجالة بن عبدة كاتب جَزء بن معاوية، قال أبو زرعة: ثقة، وذكره ابن حبان في الثقات. انظر تهذيب التهذيب لابن

حجر: 211/1-212.

[مسألة 74] إذا مرَّ حربِيَّ بِتِجَارَةٍ أُخِذَ مِنْهُ الْعُشْرُ وَإِنْ كَانَ ذِمِّيًّا نِصْفُ الْعُشْرِ

وقال أبو حنيفة: لا يُؤخذُ منهم إلا إن كانوا يأخذون مِنَّا.

وقال مالك: يُؤخذُ منهم إذا باعوا أمتعتهم.

وقال الشافعي: إن شُرطَ عليهم جازَ أخذه.

[181] أحمد، نا جرير¹⁵¹، عن عطاء بن السائب¹⁵²، عن حرب بن هلال¹⁵³، عن

أبي أمية رجل من تغلب¹⁵⁴ أنه سمع رسول الله ﷺ يقول: (ليس على المسلمين

عشور، إنما العشور على اليهود والنصارى)¹⁵⁵.

[182] عبد السلام بن حرب¹⁵⁶، عن عطاء، عن حرب بن عبيد الله الثقفي، عن جده

رجل من بني تغلب قال: (أتيت النبي ﷺ فأسلمت، وعلمني الإسلام، وعلمني

¹⁵⁰ صحيح. رواه أحمد: 194/1، والبخاري: 3156 ص 255.

¹⁵¹ جرير بن عبد الحميد الضبي القاضي له مصنفات، مات سنة 188. انظر الكاشف للذهبي ترجمة 771.

¹⁵² ثقة، رجل صالح يختم القرآن كل ليلة، ساء حفظه بأخرة مات سنة 136. انظر الكاشف للذهبي ترجمة 3798.

¹⁵³ هو حرب بن عبيد الله بن عمير الثقفي ذكره ابن حبان في الثقات، وقال ابن حجر في التقریب: لين الحديث. انظر

تقریب التهذيب لابن حجر ترجمة 1167، وتهذيب التهذيب: 370/1.

¹⁵⁴ عمير الثقفي جد حرب بن هلال، روى عن النبي صلى الله عليه وسلم وروى عنه حفيده. انظر تهذيب التهذيب

لابن حجر: 329/3.

كيف آخذ الصدقة من قومي، فقلت: يا رسول الله، أعشرهم؟ قال: لا. إنما

العشور على النصارى واليهود¹⁵⁷.

[مسألة 75] إذا ذكر الذمي الله ورسوله وكتبه بما لا ينبغي نقض عهده

وقال أبو حنيفة: لا ينتقض بذلك.

[183] (د) إسماعيل بن جعفر¹⁵⁸، نا إسرائيل، عن عثمان الشحام¹⁵⁹، عن عكرمة،

عن ابن عباس: (أن أعمى كان على عهد رسول الله ﷺ، وكان له أم ولد كانت

تشتم رسول الله ﷺ، فيزجرها [فلا تنزجر]¹⁶⁰، وينهاها فلا تنتهي، فلما كانت

ذات ليلة وقعت في النبي ﷺ، فأخذ المعول¹⁶¹ فوضعه في بطنها، واتكأ عليه

فقتلها، فذكر ذلك للنبي ﷺ فجمع الناس وناشدتهم، فأقبل الأعمى يتزلزل

¹⁵⁵ ضعيف. رواه أحمد: 410/5.

¹⁵⁶ أبو بكر النهدي، ثقة، عاش 96 سنة توفي سنة 187. انظر الكاشف للذهبي ترجمة 3365.

¹⁵⁷ ضعيف. رواه أبو داود برقم 3049 ص 1452.

¹⁵⁸ من ثقات العلماء توفي سنة 180. انظر الكاشف للذهبي ترجمة 363.

¹⁵⁹ قال أحمد ليس به بأس، وقال ابن معين ثقة. انظر تهذيب التهذيب لابن حجر: 83/3.

¹⁶⁰ ليست في الأصل. وهي في سنن أبي داود في الحدود باب الحكم فيمن سب النبي ﷺ برقم 4361.

فقال: أنا صاحبها، كانت تشتمك وتقع فيك... الحديث. فقال: اشهدوا أن

دمها هدر¹⁶².

[184] (س) شعبة، عن توبة العنبري¹⁶³، عن عبد الله بن قدامة¹⁶⁴، عن أبي برزة¹⁶⁵

قال: (أغلظ رجل لأبي بكر الصديق فقلت: أقتله؟ فانتهرني وقال: ليس هذا

لأحد بعد رسول الله ﷺ)¹⁶⁶ ¹⁶⁷.

[مسألة 76] إذا عاقدتهم الإمام: من جاعنا من الرجال مسلماً رد إليهم أو صالحهم على مال

يعطيهم لزمتهم الوفاء

وقال الشافعي: لا يلزمه إلا أن يكون من جاعه مسلماً له عشرة تمنع منه فيرده.

¹⁶¹ الحديدة ينقر بها الجبال. القاموس المحيط مادة (عول) ص 1340.

¹⁶² صحيح. رواه أبو داود في الحدود باب الحكم فيمن سب النبي صلى الله عليه وسلم ص 1541 برقم 4361.

¹⁶³ ثقة، مات سنة 131. انظر الكاشف للذهبي ترجمة 679.

¹⁶⁴ أبو السوار العنبري، وثقه النسائي. انظر الكاشف للذهبي ترجمة 2916.

¹⁶⁵ اسمه نضلة بن عبيد الأسلمي، قاتل الخوارج مع علي، اختلف في سنة وفاته. انظر تهذيب لابن حجر:

227/4 - 228.

¹⁶⁶ لائحة 165/أ.

¹⁶⁷ صحيح. رواه النسائي في المحاربة باب الحكم فيمن سب النبي صلى الله عليه وسلم ص 2354 برقم 4076.

[185] (خ) عُرُوَّةُ، عن الْمِسْوَرِ¹⁶⁸ وَمَرْوَانَ¹⁶⁹ قَالَا: (خَرَجَ رَسُولُ اللَّهِ ﷺ زَمَنَ

الْحُدَيْيَةِ، وَكَتَبُوا بَيْنَهُمْ كِتَابًا، وَرَدَّ أَبُو جَنْدَلٍ، وَرَجَعَ إِلَى الْمَدِينَةِ، فَجَاءَهُ أَبُو

بَصِيرٍ فَارَدَّهُ¹⁷⁰.

[مسألة 77] يُمْنَعُ الدِّمِيُّ مِنْ اسْتِيطَانِ الْحِجَازِ

وَجَوَزَهُ أَبُو حَنِيفَةَ.

[186] (ت) ابْنُ جُرَيْجٍ، أَنَا أَبُو الزُّبَيْرِ، سَمِعَ جَابِرًا يَقُولُ: أَخْبَرَنِي عُمَرُ أَنَّهُ سَمِعَ

رَسُولَ اللَّهِ ﷺ يَقُولُ: (لَأُخْرِجَنَّ النَّصَارَى وَالْيَهُودَ مِنْ جَزِيرَةِ الْعَرَبِ، فَلَا أَتْرُكُ

فِيهَا إِلَّا مُسْلِمًا)¹⁷¹. صححه (ت).

[مسألة 78] مَا تَشَعَّتْ مِنَ الْبَيْعِ وَالْكَنَائِسِ أَوْ الْهَدَمِ لَمْ يُبَيَّنْ

¹⁶⁸ المسور بن مخزومة الزهري، صحابي صغير توفي سنة 64. انظر الكاشف للذهبي ترجمة 5449.

¹⁶⁹ مروان بن الحكم الأموي، ولد سنة 2 من الهجرة، ولم يصح له سماع، ومات في رمضان سنة 65. انظر الكاشف

للذهبي ترجمة 5363، وتهديب التهذيب لابن حجر: 50/4.

¹⁷⁰ صحيح. جزء من حديث طويل أخرجه أحمد: 323/4، والبخاري في الشروط باب الشروط في الجهاد ص217

برقم 2731.

وهذه الرواية اختيارُ أبي سَعيدِ الاصطَخري¹⁷²، وابنِ أبي هُريرة¹⁷³ من الشافعية.

وعنه: يجوزُ. كقولِ أكثرِ الفقهاء.

وعنه: يُعمرُ ما تَسَعَثَ.

[187] وَيُرَوَّى عَنْ عَمْرِ مَرْفُوعاً: (لَا تُبْنَى كَنِيسَةٌ فِي الْإِسْلَامِ، وَلَا يُجَدَّدُ مَا خَرِبَ

منها)¹⁷⁴.

قلتُ: لم يَصَحَّ.

¹⁷¹ صحيح. رواه الترمذي في السير باب ما جاء في إخراج اليهود والنصارى من جزيرة العرب ص 1817 برقم

1607.

¹⁷² الحسن بن أحمد بن يزيد الاصطخري، الشافعي فقيه العراق، له تصانيف مفيدة، توفي سنة 328. انظر سير أعلام

النبلاء للذهبي: 251/15.

¹⁷³ شيخ الشافعية، أبو علي الحسن بن الحسين البغدادي، انتهت إليه رئاسة المذهب، صنف شرحاً لمختصر المزني،

وأخذ عنه الطبري والدارقطني، وتوفي سنة 345. انظر سير أعلام النبلاء 430/15.

¹⁷⁴ ضعيف. رواه أبو الشيخ ابن حبان في طبقات المحدثين بأصبهان: 39/3، وابن عدي في الكامل: 1199/3.

وانكم جئتم الى اعظم الشبهات فاقدمتم عليها قال وما هو
قلت المسلم يقتل الكافر قال فاشهد انك عا رجوع في هذا
وقد ذكرنا ان الذين قبلوا رسول الله صلى الله عليه وسلم كانوا
عمروا منتهى الضمير وعمروا عن بعد النبي صلى الله عليه وسلم كانوا
قتل عمار بن الخطاب مسلم مع فزولت لسر ذات الكبر قال الدارقطني
نكل عقده كذا هو الحسن بن عمار بن عديس بن عمار بن عديس بن عمار
ع احم بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار
فدبره كذا ما بين ابو اکتوب ضعيف لم نجمله على ان فيه محرم تحريم
ديان بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار
غيره وقال داود بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار
البري بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار
فلجئ بن اسرايل بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار
مسلم بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار
ان رجلا من عمار بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار
سهمه من الحسن بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار
الحسن بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار
ن السجيل بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار
الحسن بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار
جديعه قال الحسن بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار
سوء عمار بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار
ن السجيل بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار
وقال داود بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار بن عمار

رسول الله صلى الله عليه وسلم قال لا تغادوا الزمر ولين رواه احمد
ابو كمال الاحمر عن حجاج راطاه عن عيسى ورشعب عاينه عاصه عن
عمر سمعت رسول الله يقول لا تغادوا الوالد بالولد ان لم يمتدح عاينه
ما المني الصبح عيسى ورشعب عاينه عاصه عن عيسى ورشعب عاينه عاصه
حضرت رسول الله صلى الله عليه وسلم علم بقدره ان لا يغادوا الوالد بالولد
هو لا ضعن اسمعت من مسلم عيسى ورشعب عاينه عاصه عن عيسى ورشعب
عاصه عن النبي صلى الله عليه وسلم قال لا تغادوا الوالد بالولد لسعد واه ن
الجمعة بالواحد وعنه يقولون يقول داود بن محمد بن عبد الله بن عيسى
للمستب ان اسنانا فلنصنع فقله عيسى ورشعب عاينه عاصه عن عيسى ورشعب
اهل صنع فقله به ن كـ القبل بالمتقل اذا كان
ما يقصد به القدر غائث وقال ابو جعفر لا تخب اليه فله حد لب
حدثنا ده عاينه عاصه عن عيسى ورشعب عاينه عاصه عن عيسى ورشعب
رسول الله صلى الله عليه وسلم علم راسه من محمد بن احمد بن احمد بن احمد بن احمد
انه سمع طاووسا عن عاصه عن عيسى ورشعب عاينه عاصه عن عيسى ورشعب
في الخبر ليجامع من ماله في ارض من ارض حضرت احمد بن محمد بن احمد بن احمد
تمسح فاختلها بوجعها فضع رسول الله صلى الله عليه وسلم يده في جنتها بخره وان يفلحها
واحدوا بشعبه عن ابوت عن القسم بن عيسى عن عبد الله بن عيسى
ان رسول الله صلى الله عليه وسلم قال ان بيتك كخط شبه العبد فقل السوط
والعصا فيه ما من اربعون سوطا او لا ذها ن هذا روم
القاسم هذا امره عن يعقوب راوس ونازه عن عيسى ورشعب عاينه عاصه
وانه يقول عزله عن يده على العصا الصغيرة وقد قرنها بالسوط
ن السوطين ن خال من راسه ن محار هلال على السوط عاصه عن عاصه
عنا قال رسول الله صلى الله عليه وسلم لا تؤذي النفس غيرهما الا بحريه وهذا

ثم

منه معاً قال لمعز ٥ لضع الكدث لم يوصح له ان معناه ٢ قد سبوني
ابن محمد بن وهب بن ابي ايوب ٥ نعيم بن حماد قال لعنه عليه معاذ بن ابراهيم
عن ابي المسد عن ابي هريرة جرفوا لاقود الا بالسيف ٥ المستد واخبر
نا لعنه عليه معاذ بن عبد الله بن الحارث بن ابراهيم عن ابي هريرة
ان رسول الله قال لا فود لنا بصلاح رواها الدارقطني و ابو معاذ (منه) قول
٥ سلم بن كهيل عن عرو بن ربيعة عن ابي اسحق عن ابي اسحق عن ابي اسحق
قنبر بن عتبة او ربيعة بن عتبة او عيسى بن علقمة عن ابي اسحق عن ابي اسحق
جندب بن عبد الله بن اخطان البصري عن جابر بن عبد الله عن ابي اسحق
عن النبي صلى الله عليه وسلم قال لا يسلح الا بالسيف ٥ في ذلك ارض جابر
واه ورواه و زقاري جابر بن عبد الله عن ابي اسحق عن ابي اسحق
البحراني رواه الدارقطني ٥ اذا المسك رخله وقله
آخر خبش المسك وقله الفانل و عنه يقدان تقول حاله ابو داود
الحفري عن سفيان بن عيينة عن ابي اسحق عن ابي اسحق عن ابي اسحق
الرجل وقله آخر يقدان الفانل و خبش المسك رواه الدارقطني
وهو حديث منكر لعله خرفه المستحسن ولي الدم اربعون
في الفقه الى الله عز وجل في الجاني وقال ابو حنيفة لسله ذلك لا يرضى
الجاني اس اسحق بن محمد بن المغيرة عن ابي اسحق عن ابي اسحق عن ابي اسحق
قال يوم الفتح رقت بعد ما في هذا اهل هذه خمر النظر من ان شادوا فدم
فانله و ان شادوا فقله رواه احمد بن محمد بن اسحق عن ابي اسحق
عن ابي اسحق عن سفيان بن عيينة عن ابي اسحق عن ابي اسحق
رسول الله صلى الله عليه وسلم يقول مرا صد دم او خبيل الخيل عرج
فقتلوا الخيل من احد يات فان اراد الاربعة فخذوا على يديه بمن ان يقصر

او يعفو او يأخذ العفل فان قبل شئ من ذلك ثم عدا بعد ذلك فله
 الناحية لادافها مخلصا الواحد بالحمد القصاص
 او الدية وعنه الواجب القود حسب لغيره حشفه وما كان وعنه
 الشافعي لا يوافق في هذه الا اذا عفا مطلقا ثبت الدية
 على الرواية الاولى فله حديث اي شرح وحدث اي سله على قوله
 عن النبي صلى الله عليه وسلم قال من قتل له قاتلا فله الدية او ان يقتل
 او ان يقتل له قاتلا فله الدية او ان يقتل له قاتلا فله الدية
 حده ان النبي صلى الله عليه وسلم قال من قتل له قاتلا فله الدية او ان يقتل
 فان ساوا من ثلوه وان شئ واخذوا الدية بالحمد كذا
 القصاص في السر السبعين كذا في قطع حلق السبعين كذا في
 حمده عن ابن الربيع عن النضر بن عمار عن جارية فكتبت بسمها نضر
 عليهم السلام رسول فوافوا بطلوا العفو فوافوا بالله صلى الله عليه وسلم
 بالقصاص في احوالها ان النبي صلى الله عليه وسلم قال رسول الله صلى الله عليه وسلم
 والذين يفتنوا بالحق لا يكسر ستمها بالحمد فقالوا يا سركا الله القصاص
 فعفا القوم فقال رسول الله صلى الله عليه وسلم ان حر عباد الله لو افسد على الله
 لا يبره بالحمد الدية من حرنا حمده عن ابن الربيع عن النبي صلى الله عليه وسلم
 قضي بالقصاص في السن بالحمد لا يفتن بالحمد من حرنا حمده
 له يد مال وقال ان فعل يعقوب في الحار يعقوب في سب فاعلم الله
 عبد الله لم يمول على اخرج وعنه حديث الربيع بن خثيم عن رجل جرحه فاد
 ان يستفد منها رسول الله ان يستفاد من الجرح حتى يبرأ الجرح
 رواه الدارقطني قلت هذا من مائة يعقوب بالحمد ان
 انقص من ثلثه فله الدية او ان يفتن بالحمد ال موضوع اخر فلا صمان على الجاني طاف
 لا يبره من انفقوا ربرر من حرنا حمده عن ابن الربيع عن النبي صلى الله عليه وسلم

ان رجلا طعن رجلا فمات في ركبته في الالف صلصلة علم فقال اقدني قال
 في تيرابم حاله فقال اقدني فاقاد به في معاير رسول الله عرجت
 قال فدهنتك فعضمتني فابعد الله ويطل عرجك ثم هز رسول الله
 ان بعض مخرج في تيرابم صاحبه ان لا قـــــود الا
 بالسيف وبعنه فعل مثل الالة المقل بها وهو قول عاك والسافعي
 ان حرسا حرسه دواير هرع على النر صلصلة علم لا يقد الا بالسيف
 وقد مضى فذكره والماوراء النر صلصلة علم قال عرج عرقه ومن
 عرقه عرقه وهذا النر صلصلة علم قال عرج عرقه عرقه عرقه
 قـــــل عرج الخط لا يوجد القود وهو ما وجد في عرج الفحل
 وخط في القصد وقال عاك فعل عرج الخط في اوقته القود سلمه
 فهو عرج عرج عرج عرج عرج عرج عرج عرج عرج عرج عرج عرج
 مغاير عرج عرج عرج عرج عرج عرج عرج عرج عرج عرج عرج
 النر صلصلة علم عرج عرج عرج عرج عرج عرج عرج عرج عرج
 لرسل عرج عرج عرج عرج عرج عرج عرج عرج عرج عرج عرج
 العرج عرج السوط والعصا فيه ما به منها اربعون لا يكونها او لا
 دـــــل الخط اخماس عشرة وخذى ومطى بعد ومطى
 من لمون ومطى في حصر ومطى في حصر ومطى في حصر ومطى في حصر
 حصر حصر حصر حصر حصر حصر حصر حصر حصر حصر حصر حصر حصر
 صلصلة علم عرج عرج عرج عرج عرج عرج عرج عرج عرج عرج
 دكور وعرج عرج عرج عرج عرج عرج عرج عرج عرج عرج عرج
 ان سلمه النر عرج عرج عرج عرج عرج عرج عرج عرج عرج عرج
 اجماس عرج عرج عرج عرج عرج عرج عرج عرج عرج عرج عرج
 بنو لمون ذكور قال الدار فطر بنو امة ثقات وصارت حشيت عرج عرج

الزائد ثلث دية العضو وعند فيها حكمه هو ان احترقهم
المسلمين جميعا جميعا ان العلاء اخرج عن ورشع عايبه
عزله ان رسول الله صلى الله عليه وسلم قضى في العن العور الساده
لمكانها اذا طمست ثلث دنتها و2 البد الشلا اذا طم
ثلث دنتها و2 البسن السود اذا نزع ثلث دنتها ابو هلال
قال عند رزبه عن يحيى بن عمار عن ابي اسحاق انه قال في البد الشلا
ثلث الدية و2 العن العامه اذا حشفت ثلث الدية رواه الداروطي
في موضع الوجه خمس مائة دينار وقال مالك في موضع
النافه والمخبره سفلى حكمه شرب ربع فاحسن المعلم عن
عمر بن شبيب عن ابيه عن جده ان النضر صلى الله عليه وسلم قال في المواخير خمس
خمس اذا خضعت كامل ثمان مائة مائة مائة مائة
خمس مائة وحبث فيه الفخر وقال ابو حنيفه ومالك لا شيء فيه
هشتم عوده عايبه والمغیره ان عمر اسأله عنهم في اغلاق
المراه فقال المغیره قضى الله صلى الله عليه وسلم علم بالغره عدا وامه فشهد
محمد بن مسلم انه شهد النضر صلى الله عليه وسلم علم قضى به منصور عن لههم
عن عند رزبه عن المغیره ان امراه ضرتها ضرتها يعود
فيسطاط فقتلها وهو جلي قال في هذا الله صلى الله عليه وسلم علم فقتلها على
عصه القائله بالديه و2 الجنس بغره فعاد عصبته ان ذلك
الاول سرب و2 اصاب فاستهل ومثل ذلك قال يجمع يجمع
لما عاب العبايبه
نصف في القسامه ثمان المدينين وقال ابو حنيفه ثمان
المدين عليهم اللين م ع يحيى بن عمار عن ابي اسحاق
خمس قال اخرج عبد الله بن سفيان ومجيبه وسعد بن ادا

فانما خبر نفق في بعض ما هنالك فاذا اخصصه بجذعية لئلا يسهل
 قتله فذنبه ثم اقبل على رسول الله صلى الله عليه وسلم هو وحولته فمعه
 وعده الايمان يسهل وانه اضعاف القوم فذهب لسهل فلهذا جبه
 فقال رسول الله صلى الله عليه وسلم نعمت فيكم صاحباه وبعلم معهما فداوا
 مفقلا عنك لئلا يسهل فقال لهم اختلفون جسر مننا فستحقون
 صا حاتم اوقا لم يملكوا او كيف خلف ولم يشهدوا لغيرهم هو
 بحسن منكم قالوا وكيف نقل ايمان قوم كفار فلياربر ذلك
 رسول الله صلى الله عليه وسلم اعطى عقدا قالوا في الصلح غير هذا
 خنا او نعمنا ناسجد عندك فبشر بسار نعم ان رجلا من
 الانصار يقال له سهل في حثمة اخبره ان يوافي قومه اطلقوا الي
 حثمة ففرقوا منها ووجدوا احدهم قتيلا فاطلقوا فاحدوا
 رسول الله صلى الله عليه وسلم فقال لهم فاقولوا لبيته على قلبه قالوا
 ما لئلا يسهل قال فيحلفون فداوا الا نرضى بالمان اليهود فذكره
 رسول الله ان يبطل لامه فوداه بما به من ابل الصدقة
 فلت هذا امره سعد بن عبيدة وروايت الترمذي والبر
 لوطا فليس في حديثهم الا عرض التمن على المدعي عليهم وذلك في
 حديثنا ايضا لا بعد عنها على المدعي فبعضت روايتنا زائدة
 وتقولها قوله عليه السلام البينة على فراغ المدعي على امرائكم الا
 في السامه ويسألني في الايمان ان السامه اذا
 انبسط اليك لم تقبل منه سوراها سلام وقال ابو حنيفة نكره
 الشافعي قوله ان ابوك وعشيرته على عكس قال رسول الله صلى الله عليه وسلم
 فيمنه فقتلوه في اناك وزايد اخ انهم من البينة

ولا يجازي على جرحهم وقال ابو حنيفة ان كان لهم فيه جازد لل
 عبد الله بن الزبير او رضى جعفر بن عباس بن علي بن الحسين بن علي بن
 لرايكم قال صرح لي يوم الجمل لا يقتلن مذنب ولا يذف
 على جرحه من اهل البيت فهو آمن ومن طرح السلاح فهو آمن

الحدود

الحمد لله الذي جعل في دينه حكمة وحكمة في خلقه واما
 بحسب ان يقولوا انهم لا يذنبون في الجمل ولا يذنبون في الجمل
 الرافعي عن ابي عبد الله الصائغ قال قال رسول الله صلى الله عليه وسلم
 الوحي كذب لا يذنبون في الجمل ولا يذنبون في الجمل
 عنه قال صرح لي في جعل الله لهم سبيل الشك واللب واللب
 السبيل حله ما به ورحم ما يحار به واللب جلد ما به لم يفسد
 ان ناذر في ما الفضل في اهل الجمل في قنينة ورحم ما يحار به
 ان المجتوب قال قال رسول الله صلى الله عليه وسلم صرح لي في جعل الله
 لهم سبيل الشك واللب حله ما به ورحم ما يحار به واللب جلد ما به
 احمد بن حنبل في ما سعه في سبيل ورحم ما يحار به واللب جلد ما به
 على حين رجم المراه اهل الكوفة خذ بها يوم الخميس ورحم ما يحار به
 اجمع وقال اجد في سماه ورحم ما يحار به واللب جلد ما به
 لا يذنبون في الجمل ولا يذنبون في الجمل وقال ابو حنيفة وما لك
 هو بشرط بشرط في سبيل ورحم ما يحار به واللب جلد ما به
 يهودا ويهودا في سبيل ورحم ما يحار به واللب جلد ما به
 من سبيل ورحم ما يحار به واللب جلد ما به واللب جلد ما به
 هو ذم او امر انتم صليتم عن شهادته عني قال ابن عباس

لبيك مرماه واه وليك طلبة بالوعاء في الحصى رايهونه فاعيد العزير
ان محمد بن عبد الله بن قافع بن ابي عن النضر بن عيسى عن ابي عبد الله عليه السلام قال من
اشرب من ماءه فليس يحضن صدره حتى يتخمر في رقبته وحيوانه موثوق
جسده راح المراه تساو كجراح الرجل فمادون الثلث فادام الخ
الثلث فحق النصف منه وعنه ليشاونه وقال ابو حنيفة والثابت بن
في الحد يد على النصف في الثمن لم يجعله عيسى بن ابي حمزة عن محمد بن شعيب
عن ابيه عن جده قال قال رسول الله صلى الله عليه وسلم علم عمل المراه مثل عقل الرجل
حتى يبلغ الثلث في ربه فقلت اسعدك في الحاضر ضعيف في هضم
فما شعث رعد الملك بن الحسن في محمد فاما النصارى من الرجل والمراه فبينما
كان في العبد ما لم يلد له في ربه وعنه عن الشعبي ان عليا كان يقول
جراحات النساء على النصف من ربه الرجل فما قل ولا كره
رسوله الذم اذا قلته المسلم عدا دية المسلم فان مله خطيا
فالنصف وعنه الثلث ودية المحوسل بمان فاما ربه وقال ابو حنيفة ربه
الفرقة ربه المسلم وقال مالك نصفها وقال الثوري ثلثها في العبد
والخط والمحوسل ثلثها في العبد ان ابو بكر بن ابي نافع عن
ابن ابي عمير عن النضر بن عيسى عن ابي عبد الله عليه السلام قال من اشرب من ماءه
ما شرب واسمه عبد الله بن عبد الملك بن كثر بن ابي عبد الله بن علي بن سعد
عن عتبة بن مبر عن عيسى بن عمار عن رسول الله صلى الله عليه وسلم قال
ابو بكر بن ابي عمير عن ابي عبد الله بن سعد بن ابي رزبان واه في عهد الوفاحي
عن ابي هريرة عن عمار بن الحسن بن عمار بن عيسى عن ابي عبد الله عليه السلام قال من
المجاهد كره المسلم في من ربه رواه الدارقطني والحموي
لقد خط محمد بن الحنفية عن محمد بن شعيب عن ابي عبد الله عليه السلام قال
ربه ان نصف ربه المسلم ان كثر واشد ما سلم من عيسى بن شعيب
عنه عن ابي عبد الله عليه السلام علم فحق ان عقل هذه النساء ان نصف عقل

دنه المسلم فهداه على قتل الخطي رواها احمد في زائد عن منصور عن
بلية اي المقدم عن سعد بن المسيب ان جده جعل دية اليهود والنصارى
اربعه الف والمخوس بما زعمه فمن العبد اذا قتل خطا
في مال الجاني وانه الجاني على اطرافه وقال ابو حنيفة نزل بنفسه على عاقله
اكان ولله طراف في ماله وعلى السامع ليعلم وعنه النحل على العاقلة
وكسح عن عبد الملك بن جابر النخعي عن عبد الله بن اسحق عن عامر بن عبد الله قال
العبد والعبد والصلح وله عتاف لا تتغله العاقلة المواط
نوحا كذا وقال ابو حنيفة نوحا التعزير لانه كانوا القسمة الى اربعة في
لح حنيفة وداود بن الحصين عن عكرمة بن عمار عن ابي اسحق عن رسول الله صلى الله عليه وسلم
اقلوا الف عمل والموتعول في كل يوم لوط والهمم والواقع عليها وروى عن
عكاكيات محرم فقتلوه فلب ابو القاسم قال امر محرم بالسنة فاس
ان من ان الله به نوحا كذا لوط وعنه نوحا التعزير ليعلم
لا حنيفة ومالك بن ابي نضر عن ابي حنيفة عن عكرمة بن عمار عن رسول الله صلى الله عليه وسلم
عن عكرمة بن عمار عن رسول الله صلى الله عليه وسلم قال من وقع على هممة فقتلوه
واقتلوه الهممة ان اذا سرح دار محرم ووطى حرة وقال ابو حنيفة
يعزرون ما اكدت المذكور من وقع عكاكيات محرم فقتلوه ان اكدت
نا حنيفة صاحب عن السدي عن عكرمة بن عمار عن ابي حنيفة قال لعنت خالي يعني
ابا سريته ومعه الراه فعلت ان يتردد قال يعني رسول الله صلى الله عليه وسلم
الله علم لا رجل يروح امرأه ابنة يبعده ان اصرت غنقة واضمالة
ومن ان ادنس وجهها ووطى حاريتها ففعل جدمائة وطال
الهمم صده جدمائة لوط عويده عفا عن عكرمة بن عمار عن ابي حنيفة قال لعنت
ابن سريته من رجل اكلت له امرأته حاريتها فقال لا قصير بها بعضه
رسول الله صلى الله عليه وسلم ان نكح اكلتها لا تخذله مائة وان لم ياكلها

له لارحمته فوصدها فاحتملها فخلده مائة رواة انه خرج من يد عنه
 ان اذا سقطت في امراته فحدثت لم يسقط عنه الحد وقال ابو
 حنيفة لم يسقط الا في حشر في مسلم خاله في عيال في عيال في عيال
 في شغل ان وصدا من اهل حال رسول الله صلى الله عليه وآله قد رنا ما رآه
 منها فان رسول الله صلى الله عليه وآله فاستمرت في ذلك وترها مسلم
 البخاري في كتابه في ذلك في نسخة من كتاب الزنى في
 ما قرأ من ذلك خلاف المثل والشاعر في حديث ما عثر ابو عوانة عن
 سمك في سعد بن جبر عن عائشة قال لعن رسول الله ما عثر ما عثر فقال ابو
 مالك عنك قال وما بلغك عني قال انك جرت بامته ان فلان قال نعم
 فرده في شهر اربع مرات ثم امر برجمه فابعه بشرك مختصرا ورواه
 اسير اهل عسماة في نسخة اخرى عن مزين قال اذهوا به لم قال له ووه
 فلعنه في مرسية اعترف اربعة فقالوا ارحموني ان احبنا اسودت عامر به
 اسير اهل عسماة في مرسية اخرى عن عبد الرحمن بن عوف عن ابي بكر قال رآه قالوا عند
 النبي صلى الله عليه وآله في ما عثر فاعترف ما عثر فاعترف الناس فرده لم
 فاعترف الباقية فرده فقلت له انك ان اعترف الاربعة ارحمت فاعترف
 الاربعة فحسبه لم سال عنه فقالوا لم يعلم له خبرا في مرسية فاعترف
 واه ان حجاج ارطاه عن عبد الملك بن المغيرة عن عبد الله بن المغيرة
 عن ابي ذر قال سمعت رسول الله صلى الله عليه وآله قال ما عثر رجل فقال ان الاخر قد رآه
 فاعترف عنه ثم شق ثم لم يرح فامرني فمخونا له فرمى همام بن محمد احبنا
 بن عبد الله بن محمد بن عيسى قال ان ما عثر في ذلك حجاجي فاصابته من امر
 فقال له اي ان رسول الله صلى الله عليه وآله فاذكره ما صنعت لعله يستعزلك
 وانما رآه في ذلك رجلا من كون له محرق فانه فقال رسول الله صلى الله عليه وآله
 فاعترف عنه ان ان اياه الاربعة فقال له انك قد فعلها اربع مرات فبمئن قال
 فعلم انه قال اهل صلحتنا فالاربعة قال اهل ما شرفها فالاربعة قال اهل ما يجمعها

فلا نعلم قامة من ان يرحم فوجد من الحجاز فخرج فاستند فلقية عند الله
انيس فخرج له بوظيف نعيم فعلمه وذكر ذلك للنبي صلى الله عليه وسلم فقال
هلا تركتموه لعله يتوب فتوب الله عليه فحدثني ان نعيم قال
انه ان رسول الله قال له حذر راه والله ما هنالك لوقت سنزله موبك
ان خيرا من صنعته به قلت هذا القول رسول الله صلى الله عليه وسلم
تسبى رايها جزا على الله صلى الله عليه وسلم عاينه فالتفت عند النبي صلى الله عليه وسلم
اذا جاء في ما عز فقال يا قدرني الكثرة وفيه فامر فحمله حوله جعل
فمنها ان صدره لم امر الناس ان يرحموا قال صلى الله عليه وسلم فحدثت اصحاب
في الله صلى الله عليه وسلم علم بيننا انه لو جلس بعد اعرافه بلث لم دخله وانما
رجمه عند الرابعة ان عدالته في حاله على شهادته في المستعين
لا هصره قال رسول الله صلى الله عليه وسلم وهو في المسجد فاداه با
رسول الله ان يملأه قد زنى فاعرض عنه فمحا الشوق منه الذراعين
فله فقال يا رب فاعرض عنه في لشوقه الذراعين عنقه فمشتد
على نفسه اربع سدادات دعا الله صلى الله عليه وسلم فملا بك حول قال
لا رسول الله قال احصت فلا نعلم قال اذهبتوا به فارجموه
رحمته وانا اموه على هديره فاما ما سئل رسول الله صلى الله عليه وسلم
قد زنى فاعرض عنه وفيه فله وحدثني الحجازي من مشد وفيه
قال هلا تركتموه قلت والله ما حدثت اخي فاصحوا حديث
العسف وفيه واخذوا انفس على امره هذا قال بعد فارجمها فملا
ان اعرفت ان عراف المعلوم بالتردد ان اذا اف
ما لم لم ان سقط احد حلاق لداود ولا حذر الرماش عن مالك
ان حازما رحم هرب فقال عليه السلام هلا تركتموه
للسعد راقامة الحدة على رقيقه حلاق لاني حنيفه

[illegible]

ابن عباس عن عشرين بيتان عن حذيفة بن اليمان انه قال قال النبي
سروا حين حلة الرحيل للدين سرقا غنما الناس فقال انه لم
يمسح في طعنها الا ان يسرا طاه وصدقته سرق في الخنزير
تحله ولم يقطع يدك وقال بها رسول الله صلى الله عليه وسلم علم من اقطع
في الخنزير فيه ليطيعه سعد بن مسعود عن النبي صلى الله عليه وسلم
عن ابي بكر بن عمر عن محمد بن عوف عن ابي الدرداء انه قال من ان يبا
لكي دور على الرجل وهو غارح يفتل مخاضه ان لمحة الحمة فالحق
بالفارس طلب لك مرم ضعف ورجل هذا واحسوا بهذا
الحسن في الحشيش عزندوا فذبحوا لولده عن ابي الصامت
قال رسول الله صلى الله عليه وسلم اكدوزي اخضر والسفر على الفتى والبعد
ولا تالوا في الله لو لم يلم لسانه واه ويلي جنة العموم ومن
خصص الغزو طوبى له
لا يسلم عليه اكدوزي وقال ما لك يعز الامام يا حنيفة وان
زاد على اكدوزي بن عبد الله بن مسعود عن ابي الحسن
لرجاء بن علي بن ابي طالب عن رسول الله صلى الله عليه وسلم قال لا كل فوق عكسر
حله ان لم يدر في روضه في ما مرفوعه من بلغ حد الى غزوه
فهو المحدث في السنة
انصافها ربع دينار او ثلثة دراهم او ثلثة دنانير وهو
قولك وقال ابو حنيفة لصاحبها دينار او عشرين دراهم او ثلثتها وقال
ان ربع دينار او القمه لست اكون عن ابي عبد الله عن رسول الله
صلى الله عليه وسلم عن ابي عبد الله عن ابي عبد الله عن ابي عبد الله
صلى الله عليه وسلم ان يقطع ربع دينار فضاء ان احمد بن هاشم بن
شاذان عن ابي عبد الله عن ابي عبد الله عن ابي عبد الله عن ابي عبد الله

قال رسول الله صلى الله عليه وسلم علموا ان ربيع الدنيا ان لا تقطعوا فيه
هو اذ نبي منه قال و ٥٠ منته يومئذ سلم ان احقوا بالاسحق
خرجه ورسوله اسه وخرجه ان وسمه المحسن ان على يد رسول الله صلى
الله عليه وسلم عشرة درهم ان سلم قبسه فانظر الى هذا في حاج بن
ارطاه عن عمر بن الخطاب وخرجه ان لا تقطع بالسار و ٢٥ عشره دام
ان السور عن منصور بن عيسى بن خالد بن سلم بن قيس بن قيس بن قيس بن قيس
رسول الله صلى الله عليه وسلم علم ان في من المجن وسمته يومئذ نارا قال
الدارقطني ان من تبعي قال المولف وارسو وسمه وخرجه ان
كس الفوطع على احد العائيه حلافه درهم الهم ارم
خرجه وخرجه ان قال كانت امراه مخرومة لستعير المتاع وخرجه
فامر النبي صلى الله عليه وسلم بقطع يدها فان اهلها اسامه بكموه فلم
اسامه رسول الله تعالى اسامه الا اراك نكلمني في حبه وخرجه
له ثم قام حطت فقال انما هلك و ٥٠ من سلم كانه اذا سر وسمه الشريف
سر لوه واداسه وسمه الصعيف فخرجه واداسه بنفسه يد لوه
فاطمة بنت محمد لقطعت يدها فخرجه يد المحرومة بخرجه سلم
قال عبد الرزاق و ٥٠ من عيسى بن عيسى بن خالد بن سلم بن قيس بن قيس بن قيس
المتاع وخرجه فامر النبي صلى الله عليه وسلم بقطع يدها
اذا اشترى من جماعة سرقة لصاحب فخرجه واداسه واداسه
واينظر ان يخرج النصاب من وقال ابو حنيفة واداسه فخرجه
ابو حنيفة واداسه فخرجه فامر رسول الله لعبد السار سرقة السخه
فقطعه يد وخرجه اكل فخرجه يد فخرجه هذا السخه على طول وهو
ان خرج واداسه اذ حلت بكس الغرم مع الفوطع قال
ابو حنيفة القطع من الضمان واداسه ان ٥٠ من السار وسمه المذهب

وان كان معتر المذهبهم لن قوله عليه السلام على الدنيا اذنت على نؤذنه
وقدمت في البسوح ولهم شعيرة عفرنا مفصل فضاله عن يونس بن
بريد بن سعد لم يهزم عن اخيه مشور بن عبد الله بن عتبة بن جعفر بن
قال رسول الله صلى الله عليه وسلم لا غم على السارق بعد قطع ماله سعد
قال الله ارفع من محمول المسور لم يدر الى عوف ه اذا مـ
السارق الحر المشروقة توجه لا يسقط الحد فلا يقطع حنيفة
حنيفة قال ارفع من محمول المسور صوفان عا سم ان صوفان راسه قال سنا
انا راقد ارجا سارق فاخذوني ورجعت راسي فادرسه فاسم اليه صل
لله علم فامر بقطع ماله رسول الله ليس هذا اردت هو عليه صديقه
قال اهلا قتل ان ياتني به ه ورو ابو داود وحدث محمد بن سيرين
العاصم ان رسول الله قال يا عافا الحد ودفنا منكم فاما بلغني مرة فعدو
ويعطى النكاح اذا بلغ فيه الف درهم فاما حد فاما حنيفة
روا حنيفة انه عليه السلام دعى ناسا اسرا من بني قيس بن عيلان
معهوم فصره قال يقطع يونس بن الحسن وسمه قال يقطع النكاح ه
اذا سمع رقة المرة الثالثة وبعدها لم يقطع بل يحبس
في ارجل الرواسين وهو قول حنيفة وسمه يقطع ابا سمه بن ابي
وسمه الرابع رجله اليمنى وهو قول حنيفة وسمه يقطع لسمه بن ابي
كثير الخبيث يقطع حنيفة عن عمر بن عمر بن عبد الله بن عوف
السري وطمع به اليمنى فانما يقطع رجله اليسرى فانما يقطع اليمنى
حتى يحدث خيرا اني لا استحي ان ادعى لعنن بن ابي جندب ان احبوا
ببريد بن ابراهيم بن عيسى بن عذرة بن ابي المنذر بن جابر بن رسول الله
لن سارق فقطع يده ثم اني به قد سرق فقطع رجله لم اني به قد سرق
فقطع يده ثم اني به قد سرق فقطع رجله لم اني به قد سرق فقطع يده

معدية محمد بن عبد بن عباس وهو ضعف في الدار قطعي في
الحسن الملقب كما احمد بن عباس في السجل سعد بن الوادعي عن
لثيب عن خاند بن سلمة ان اراه في سلمة في شرب حرقوا بالدا
سرو الساروف في دطعوا بده فاراد في دطعوا رجليه فاراد
فاوطعوا بده في نمارق في دطعوا رجليه الواقدي هال في خلد الحذا
عن عكرمة بن عمار بن عتبة بن دطع بعد ورجل نارا
حذر الزل سيقط بالوبه في الشقة والشرب وغنة
سقط لعل في حشفه واما في الشافعي في المذهبي سلم بن
سعد الحمصي عن ابي جهم بن عبد الله بن عباس في السوالله الله
الدين لم يادنه في ذلك انما في المظلم المظلم
خلاف في حشفه لعل في المظلم في المظلم معمر بن السعدي
قالهم سعد بن العبد بن المظلم في حشر المراه في المراه في المراه
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و رسول الله صلى الله عليه وسلم قال فانطلق فتبعه رواه مسلم في مسندهم سعيد
ما حدث به الكرخ عن ابي بصير قال كنت رسول الله وهو يريد غزوا
انا ورجل من بني دليم ولم يستلم فعلنا ان نسبح ان يستند قومنا مشددا لا
يشهدون معهم قال او استلمنا فكلنا قال فانما لا نستعين بالمسلمين
فاسلمنا وشهدنا معه اخموا ان غلبته في يدي يدي يدي يدي يدي يدي يدي
ان النبي صلى الله عليه وسلم استعان بنا سر من اليهود في حربه فاسمهم لم لب
المراة في حبه سر في غاراه بر ان النبي صلى الله عليه وسلم علم اسمهم لليهود عرفوا
معهم مثل شهام المسلمين رواه ابو داود في المراسيل قلت مر اسير
الزهر ضعيفه ان لا يصح ان النبي صلى الله عليه وسلم الفاني ولا رايه في زمن
ولا اعلم له ان يكون لم راي وبني يه خلافا للنوا للشافعي المثلث عن ابي
ان لم يرا خبره ان امرأه وصرت في بعض معارف رسول الله صلى الله عليه وسلم علم
في خبر ذلك ونهر عن فضل النساء والصلوات صححت
اذا استنوا المشركون على اموالهم لم يملكوها وقال ابو حنيفة وملك
بملكونها لن النبي صلى الله عليه وسلم في ولاية عليا المليك عمن ان حضر ذلك
العضد الرطل و في شغل و في بيوانق اي حجة فانسر اهل واخرت العضد
معهم تحسبها رسول الله صلى الله عليه وسلم علم لرجله ثم ان المشركين انما رواها في
المدينة و في العضد فيه واسروا امرأه من المسلمين في تو اذا انزلوا
انما فوا اياهم باقبتهم فامنت المرأة ذات ليله بعد ما ناموا في الحمار
انته على بحر رغاي حجة انت على الغضبة في ذلول في كسرتها لم وجهتها
قبل المدينة ونذرت ان الله انيها عليها ليحرفها في قلوب المدينة
عرفت النافه وفضل في رسول الله فاحتر النبي صلى الله عليه وسلم علم من درها
او انتة فاحترته فعالي يسرها جزيتها ان الله انيها عليها ليحرفها في
لا وفي ليدريه معصية لله ولا في ليدريه ان الله انيها عليها ليحرفها في

ذلك

فقال له ما عندك يا ثمامة قال ما قلت لك فتر له حتى قال بعد الخد
فقال ما عندك يا ثمامة قال عاد العول فقال رسول الله صلى الله عليه وسلم اطلقوا
ثمامة فانطلق به الى صنع قريش فاقبلوا به فدخلوا المسجد
فقال اشهدوا ان لا اله الا الله واشهدوا ان محمدا رسول الله له وقد من الله
صلى الله عليه وسلم على ابي عزة الجحفي وقد انا سار يوم بدر غزاه
في الشنعة عن ابي عمار ان رسول الله صلى الله عليه وسلم جعل في اهله اهل
يوم بدر اربعين من احداهم على ايامهم عن حمزة بن اسفان قال استشار النبي
صلى الله عليه وسلم ان يسار يوم بدر فقال ابو بكر بن ابي عمار
عنهم وبعدهم الفداء عنهم وقتلهم الفداء انوثت على فلاة
عن حمزة بن اسفان ان النبي صلى الله عليه وسلم قد ارجل امر المؤمنين برجل
السنة للعامل وعنه لا يسجد له ان يشترط له ذلك
وقال كذا يسجد بالشرط ويحسب محسوبا رحمتا الحسن بن علي بن عبد
عن حمزة بن اسفان عن ابي مولى بن قنار عن ابي فارة قال قال رسول الله صلى الله عليه وسلم
وقتل قتله له عليه سنة فله سلبه احمد بن ابي ابي مخنف قال سمعته يقول
قال احمد بن حنبل عن ابي عوف بن صالح قال قال ابو لهيب ان رسول الله صلى الله عليه وسلم
لم يحسن السلب سنة امان العبد وقال ابو جعفر الا
ان ما دون له السنة في القتال له عن عمر بن ابي ربيعة التميمي عن ابي جابر
عن ابي جابر عن ابي عوف بن صالح قال سمعته يقول قال ابو لهيب ان رسول الله صلى الله عليه وسلم
صكف فيها اسنان لمن لا يشاها من احوال فعداها في ذمة الله
واصله يسعي بها اذناهم ان سلبنا من اهل عتبة يزيد بن الوليد بن ج
عن ابي هريرة عن النبي صلى الله عليه وسلم قال لا خير على امتي اذناهم رواه احمد
عن ابو صالح عن ابي هريرة عن ابي جابر عن ابي جابر عن ابي جابر عن ابي جابر
عن عامر بن شعيب عن ابي جابر عن ابي جابر عن ابي جابر عن ابي جابر
رواه شعبة في سنة

الحليل

للفارس ثلثة اسهم وقال ابو جعفر سهمان للمبارك فليم ربح
 والمبذير الفارس على الله ان الله صل الله عليه اعطى ابنه سهما وربع
 سهمين في حذر ان حدس عدله ربح في ثلثه لثمة لثمة ربح
 قال الما في رسول الله مائة في الفارس على المجنبه السهم و٥٠ من المتداد
 على المجنبه الثمن في الفارس رسول الله صل الله عليه علم مائة وهذا الناس
 ضلوا فربسهم فقام رسول الله بحس الغار عنه وقال لا قد جعلت
 للفارس سهمين ولل فارس سهمين لم يصبه بقصة الله قال عله الله
 له ثلثه هو المجنبه ان ضعهوه وقال النبي لربس ثلثه
 ثلثه السهم على الفارس فان ربح في الفارس ربح مع رسول الله
 صل الله عليه ان واخي ومعتا في سلمان فاعطانا ستة اسهم و٥٠
 الدار فظن قد ربح ضعف ان او اسامه ان عله الله في الفارس
 لربس قال اسهم رسول الله للفارس سهمين واخا جبه شهما
 فاحسوا الله بالحق في حذر ان يجمع يعقوب ربح في حذر في حذر
 عدا اجميز ربح عله مع جاريه فاقسم رسول الله حذر في حذر
 الفارس سهمين واعطى الراجل سهمين قال ابو داود وفيه وقصة
 ان ولد فربس ان عله لربس في الفارس ان رسول الله صل الله عليه علم
 للفارس سهمين ولل راجل سهمين رواه ابو السبب بور في الراجل ربح
 لربس ثلثه عنه فم قال ربح لربس ثلثه او الراجل لربس ثلثه او الراجل
 لربس ثلثه ربح ربح ربح ربح ربح ربح ربح ربح ربح ربح ربح ربح
 للمبارك عله لربس ثلثه فلعلى الله ربح
 لربس سهمين وقال اكرهم لا يسهم الا ربح واحد
 سعد بن منصور في الفارس ربح ربح ربح ربح ربح ربح ربح ربح ربح ربح ربح ربح
 سهم ثلثه و٥٠ ان اسهم للراجل فو قد ربح و٥٠ ان ثلثه عشرة

افراش سعيد مخرج فضالة الرسل خير الرسل ان عيب
الا ان عيب ان اسبم للفوس سمين و لكثير من اربعة اسبم ولصاحبها
سبم فذلك خمسة اسبم وما كان فوق العرس فهو جانب
لا سوق في السنة من كل درهم محرم وقال انه هم
كوز مع احد اف مولى في السبع لامة و صدر الى موسى لعيسى
مصر و يس والد و ولد لها ن اذا سوق اموال الطفل
او احد هو دعم باسلامه خلا لا لا شرهم على هزرج
قال رسول الله صلى الله عليه و آله و آله و آله على الفطرة فبواهود انه
و نصرانه ن اذا سوق اموال الطفل
و المصحف و الحوان و قال اكثرهم يحورن الدرا و ردي فاصاح بن
شهر بن ادريس بن سالم بن عبد الله انه ن مع مسلمة في ارض الروم فوجد
في بيت رجل ثوبان ابيضان سالما فقالا لرجل عبد الله عيسى ان رسول الله
قال و قد خرجت من امة غلوا فخرقوه قالوا احسبه قالوا اخر به
قال فخرجت من امة الى السوق فوجدته مصحف فقال سالما فقال
بعه و صدق بممنه حتى ضعفه حتى و الدرا و طين و قال له سابع
عليه و لا اصل له و قال له ما لي يصير يا سابع
هو اما الامر اربعة اموال التي لا يكتصون بها و عنه
يكتصون فوالله احسفه الزهري في عروه في جند الساعد
قال اشجع رسول الله صلى الله عليه و آله و آله و آله فقال له لا للنبية على صدقة
في هذا الم وهذا الهدى لي افلا طس في ثابته و امه منظر
الهدى الله ام لا و الذي نفسي بيده اني اصدقكم منها شي الا جا
به يوم الحساب على رقبته يا احمد يا اسير عيسى يا اسير
عيسى يا عيسى سعيد عروه في جند الساعد من ان رسول الله

نقطة

صل الله عليه وسلم قال هذا انما العمل بالدين وسيرور على رعا
 في ديني هذا يا ايها الذين آمنوا يعملوا
 الى راض
 مكة فحي عنود وعنه ضل على قول الله مع لب الكنت على المعبر
 على شريح عن انتم صل الله عليه وسلم انه قال ان العذر يوم يوم مكة ان
 مكة حرمها الله ولم يحرمها الا من فلا يحل لكم يوم يوم الله اليوم
 له فزان بسفكها دما ولا يحضه بها تحريمه قال احد من قري
 لعالم رسول الله يقولوا ان الله اذن لرسوله ولم ياذر الايام
 اذن فيها ساعة في هار وود عاد حرمها اليوم لحرمتها بالامر
 فسدغ الك هذا العبد ان الله وراعي في احدى بحه فابو سلمه
 حدثني ابو هريره عن النبي صلى الله عليه وسلم قال ان الله حسن في مكة
 الفيل وسادك عليها رسوله المومنة وانها لا يحل الا صلح
 بعد ذلك وانما احلت لي ساعة في هار مكة من المومنة في باب
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 صل الله عليه وسلم فدخل مكة فبعث النبي صلى الله عليه وسلم على احد المختبرين
 وبعث جالدا على المختبرين هري وبعث ابا عبيدة على الجيوش
 فاحد وادخلوا ادر رسول الله صلى الله عليه وسلم في المدينة وقد وشت
 في شربا وناشرب وقالوا ان قد هروا فانزلهم في ثامعهم وان
 احسبوا اعطيت الله شربا قال ابو هريره فوطر فقال يا
 ما ما هره فلبت لبيك رسول الله قال اصف لي انما انصار و
 ناسي الا انصار بعثت لهم جي وافي فافواه فقال يروون
 الا او باش ورسول الله صلى الله عليه وسلم قال سبعة احدهما على له اخرى
 احدهم هم خمسة احدهم في الصلح والابو هريره فانطلقنا

في ديني هذا يا ايها الذين آمنوا يعملوا الى راض
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فما لسا احد منا ان نعمل منهم ماشا فقال ابوسفان اني تحت حضرا
ترشش اقرش بعد التوفيق تعالى رسول الله صلى الله عليه وسلم اني اعمل ما به ليعلم
وردد دارك سفلان ليعلم خلق الله ان ابواهم يا قبل رسول الله
لا الحجة فاستلمه كطاف بالثوب وبنو فوس اخذ بسننه فاني
طوافه على جنم الى جنب السبع وانه جعل طعنها عنده ويقول
حاكرو وهو الباطل لما اني الصفا فعلاه حيث ينظر الى السبع
فرفع يده ليجل يذكرك الله بما شئت ان يذكركه ويدعوه في الحسن
لربنا له كملك ههنا عاينه عاينه قال رسول الله فحيث الذي بالسبع
وفي المدينة بالعران قال الله هذا احد ثمنك اني هذا قول جالك
وقد رأت هذا الله لربنا له ذنبا كحوز
سبع ربيك فيقول السبع وعنه ١ وهذا مني على الضياء والعنوة
فان من في عنوة صارت وفقا على المله وان كنت صكتي به فاقبه
على اهلها اذا لم يكن له عنوة فاما ما من خير
من صفتها ثم الغامر ومن وقفتها وعنه بحت فستبها لعل املد وقال
او حسمه كثر من سمها وسمها اهلها باخراج وهرجهم عندها
وبلى بقوم اخر من نصب عليهم الجراح وليس له ان يقفها اسد رموس في
حي زكريا و سفلان عيسى وسعدى لشهر ريسا وسهل في حمة
قال صم رسول الله صلى الله عليه وسلم خير نصفي نصف لنواسه وحادة وصد
من المسلمين قسما منهم على منتهى سها
اخرا في الفلح اربعة احاسر الغنم وقال املد وال في يكون خمس احسن
الذي المصباح اوجع في عاينه ان رسول الله بعث لهره الى كد بلغ
منها هم اني عاينه او بعث رسول الله بعث انحر العلة في كد عاينه

اذ اعلم انهم لهم مامون في حال مسيارهم
 او صلحهم على مال يعطونه لزمه الوفا وقال الب مع ولا يلزمه
 ان يكون ترجاه مسلما له عشرة تمنع منه فزده عزوه
 المسور ومروان قال اخرج رسول الله زكريا بنه وكتبوا بينهم كتابا
 وردا انا جندل ورجع الى المدرسة فحاه ابو بصير فزده ٥
 لم يسمع الذم من اسنطان البخاري وكونه ابو صفه الحارثي
 ابو البرم سمع حازم بن ابي اسير انه سمع رسول الله صلى الله عليه وسلم يقول
 لا حرج من النصارى واليهود من حرمهم العرب فلا اتزل فيها لانهم مسلمو صحته
 السعته والبيع والنايس او انهم لم يبين وهذه
 الرواه اخبارنا سعد بن صخر وكتب في ربح والسفحة وعنه بخور
 لفتة الكره الفقهاء وعنه بغير ما شعث وثمة عترة وقوية في نفسه
 له سليم ولا يحدها خرب منها قلت لم يفتح **الكتاب**
 الحمد اذ الدليل في الصيد لم يفتح وعنه بباح لعلوا لا وعنه
 الشافعي لان سمعه عن ابنه السفوح الشيعي في عهدى عام سالن النبي
 صلى الله عليه وسلم فقال اذا ارسلت عليك المعلم فقل فيك قد اذنا اننا قد
 فاما انك فاعلم انك نفسك ولهم حسن المعلم وعنه وسعد بن غرامة عن
 صده ان رجلا الى النبي صلى الله عليه وسلم فقال له ابو ثعلبة فقال رسول الله ان
 ايامك عليه فافتى لا حنكها قال له ما امسك عليك قال لا حتى
 وعنه في قال في وعنه في قال وان اذ لم يفتح قال وان اذ لم يفتح قال رسول الله
 اني لا اوسى قال له ما اردت فقلت في وعنه في قال في وعنه في قال وان
 نعت عن وعنه في وعنه في ما لم يفتح او قد فقه انما غرة سمع
 رواه الدارقطني اذ اقتضى **الكتاب** في صدم وكوه فمات لم يحل
 خذ في واحد في الشافعي النور من ان في عمانية في افق عرجون رافع